Supreme Court, U.S.
FILED

No. 09-863

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In The

Supreme Court of the United States

MICHAEL RUSSO and JAMES GROSJEAN,

Petitioners,

v.

RODERICK O'NEAL and CHARLES POINTON,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Nevada

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether it was error for the state courts to refuse to entertain a federal cause of action under 42 U.S.C. § 1983 through applying state discretionary immunity rather than federal qualified immunity to the state actors?

II. Whether it was error for the state courts to refuse to entertain a federal cause of action under 42 U.S.C. § 1983 when the parties and controversy were properly before the Nevada Supreme Court and, absent a valid excuse, the Court avoided the claim in an interim appeal stating that the issue could only be raised in a final appeal, and then, when faced with the final appeal, held that the issue could only be addressed in the interim appeal?

LIST OF PARTIES

I. List of parties to this proceeding (as set forth in caption):

   a) Michael Russo

   b) James Grosjean

   c) Roderick O'Neal

   d) Charles Pointon

II. Other parties in proceeding before the Nevada Supreme Court:

   a) State of Nevada/Nevada Gaming Control Board

III. Other parties in proceeding before the trial court:

   a) Donnie Espensen

   b) Michael Allgier

   c) Bert G. Shenke

   d) Scott Crockett

   e) James Brown

   f) Robert Hamer

   g) Gene Dessel

   h) Phillip Pedote

   i) Anthony Vincent

   j) Griffin Investigations, Inc. (no parent or subsidiary companies)

   k) Imperial Palace, Inc., now known as Imperial Palace, LLC (no parent or subsidiary companies)

LIST OF PARTIES – Continued

l) Desert Palace, Inc. d/b/a Caesars Palace (Desert Palace, Inc., is a wholly owned subsidiary of Caesars Palace Corporation. Caesars Palace Corporation is a wholly owned subsidiary of Caesars World, Inc. Caesars World, Inc., is a wholly owned subsidiary of Harrah's Operating Company, Inc. Harrah's Operating Company, Inc., is a wholly owned subsidiary of Harrah's Entertainment, Inc. Harrah's Entertainment, Inc., is a wholly owned subsidiary of Hamlet Holdings, LLC)

m) Park Place Entertainment, Inc. (erroneously sued as doing business as Caesars Palace)

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CITATIONS TO DECISIONS IN THIS MATTER

This is a petition for writ of certiorari for review of the Order Affirming in Part, Reversing in Part and Remanding, in the matter of *Russo v. State of Nevada/Nevada Gaming Control Board*, Case No. 46019 (Nev. 2009). This unpublished decision is the final judgment rendered by the highest court of the state of Nevada concerning Nevada Gaming Control Board police officers, Roderick O'Neal ["O'Neal"] and Charles Pointon ["Pointon"], and is attached at App. 1-23.

Earlier, the Nevada Supreme Court had entered an Order of Affirmance in an interim appeal concerning O'Neal and Pointon. That decision, *Russo v. State of Nevada/Nevada Gaming Control Board*, Case No. 40216 (Nev. 2004), was also unpublished and is attached at App. 27-29. Additionally, the unpublished trial court order from which this matter arose is attached at App. 31-33.

STATEMENT OF JURISDICTION

Petitioners, James Grosjean and Michael Russo ["Petitioners"], seek review of the Order Affirming in Part, Reversing in Part and Remanding, of the Nevada Supreme Court, filed July 30, 2009. App. 1-23. The Nevada Supreme Court denied rehearing in an Order Denying Rehearing and Motion to Publish, filed October 20, 2009. App. 34-35. Petitioners seek a writ of certiorari pursuant to 28 U.S.C. § 1257 (2009)

in that the state courts have decided an important question of federal law in a way that conflicts with a relevant decision of this Court. *See* Sup. Ct. R. 10(c).

This petition concerns the part of the order affirming the denial to amend to plead a federal cause of action against O'Neal and Pointon and effectively finally disposing of them from this case. (The reversal and remand concern other parties, and, in fact, a separate incident that had been severed for trial.) There are no further state proceedings for Petitioners to invoke to proceed against O'Neal and Pointon. This Court is to give practical, rather than technical construction, to determine finality. *Local No. 438 Constr. & Gen. Laborers' Union v. Curry*, 371 U.S. 542, 549 (1963). In this case, the order is final with respect to issues of federal law which provides the basis for this Court's appellate jurisdiction. *See New York Times Co. v. Jascalevich*, 439 U.S. 1317, 1318 (1978). This matter is separable from the remaining proceedings in the state court and allows for the "' . . . review of the adjudication which is concluded because it is independent of, and unaffected by, another litigation with which it happens to be entangled.'" *Local No. 438 Constr. & Gen. Laborers' Union*, 371 U.S. at 549 (citation omitted). Like this Court's decision in *Mississippi, Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 370 n.11 (1988), "[t]he critical federal question . . . has, however, already been answered by the State Supreme Court and its judgment is therefore ripe for review."

RELEVANT CONSTITUTIONAL PROVISIONS AND STATUTE

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

U.S. Const. art. VI, cl. 2.

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any right, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in

> any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (2009).

STATEMENT OF THE CASE

Through unfounded legal maneuverings, the Nevada Supreme Court allowed the dismissal of state actors by 1) failing to address the error of the trial court in applying a state governmental immunity statute to a proposed cause of action under 42 U.S.C. § 1983 (2009) and 2) allowing an interim appeal which affirmed the dismissal of state actions based upon a state immunity statute to be "law of the case" as to the proposed federal cause of action. In doing so, the Nevada Supreme Court intentionally protected state police agents who blatantly violated Petitioners' constitutional rights by manufacturing evidence with an ulterior purpose of recouping gaming losses for a casino through charging Petitioners with a crime they never committed. The Nevada Courts are protecting reprehensible police misconduct by repeatedly failing to apply the test for qualified immunity to the federal cause of action.

In short, following the dismissal of state causes of action, Petitioners, Michael Russo and James Grosjean, sought to amend a complaint to plead a cause of action under 42 U.S.C. § 1983 against four Nevada Gaming Control Board ["Gaming"] police agents in their individual capacities for constitutional violations arising from two separate incidents: 1) the Caesars Palace incident which is the subject of this petition and 2) the Imperial Palace incident. The trial court misapplied state discretionary immunity to the proposed federal cause of action and denied the amendment as to all officers involved in both incidents. App. 31-33; 41-46. In the Order of July 30, 2009, the Nevada Supreme Court reversed as to two agents in the Imperial Palace incident by applying the qualified immunity test of *Saucier v. Katz*, 533 U.S. 194, 200-201 (2001), and finding no absolute qualified immunity as to the alleged unlawful search and seizure of Petitioner Grosjean at that venue. App. 1-23 at 8-15.

However, as to the remaining two police officers who were involved in an incident at Caesars Palace and had fabricated evidence to procure the arrest of Petitioners, the Nevada Supreme Court had two opportunities to correct the trial court and did not. First, the Nevada Supreme Court found that review of a denial of an amendment of a complaint could not be certified as final for an interim appeal. In that interim appeal, the Nevada Supreme Court applied state discretionary function immunity pursuant to Nev. Rev. Stat. § 41.032(2) (2009) to the state law

claims and affirmed the dismissal of the agents. App. 27-30. The Nevada Supreme Court refused to address the proposed amendment seeking to add a claim pursuant to 42 U.S.C. § 1983 claiming a lack of jurisdiction. App. 27-30 at 28 n.4. Then, after the conclusion of the case as to non-governmental defendants, the Court affirmed the denial of the amendment to assert the federal cause of action based law of the case arising from that interim appeal which never addressed the federal qualified immunity question. App. 1-23 at 5-7.

The proposed amended complaint, at App. 51-78, set forth the relevant facts upon which Petitioners relied to support a claim under 42 U.S.C. § 1983. Petitioners are skilled gamblers who were playing three card poker at Caesars Palace on April 21, 2000. App. 56, ¶¶ 4-6. The dealer was unintentionally exposing his cards to Petitioners which knowledge Petitioners utilized to win about $18,000. App. 56, ¶ 8; 57, ¶¶ 10-11. ("Hole-carding" is a legal activity in Nevada and not "cheating." *Lyons v. State*, 775 P.2d 219, 221-222 (Nev. 1989), *modified on other grounds by City of Las Vegas v. Eighth Judicial Dist. Court*, 59 P.3d 477 (Nev. 2007)). Caesars' surveillance personnel became suspicious and began watching and filming Petitioners' play. App. 57, ¶ 12. Caesars' personnel traded out the cards on the table to examine them for evidence of bending or marking. They found no evidence of cheating. App. 57, ¶ 14. Despite knowing that Petitioners were not cheating, Caesars' personnel took Petitioners into custody based upon a

defamatory report in Caesars' possession in order to recoup its losses and "teach Petitioners a lesson." App. 56, ¶¶ 17-18; 59, ¶ 32; 60, ¶ 34. Caesars enlisted the assistance of the Nevada Gaming Control Board, the state agency in charge of gaming crimes. App. 60, ¶ 34. While in custody, Petitioners explained that they saw the dealer's cards through sloppy dealing. App. 61, ¶ 38.

Gaming Agents O'Neal and Pointon met with Caesars' personnel and, reviewed the surveillance films of Petitioners' play, the defamatory report and the cards from the table. App. 60-61, ¶ 35. In viewing the films and inspecting the cards, it was patently obvious to the police agents that there was no evidence of card bending or marking. App. 61, ¶ 36. Further, after this "investigation," Pointon told Petitioners that the aces and tens were bent which he knew to be false. The game being played was three card poker, not blackjack, and no meaningful statistical advantage could be gained by bending aces and tens. App. 59-60, ¶ 32.

Despite the lack of evidence, Pointon and O'Neal arrested Petitioners on a fabricated charge of cheating through bending cards and took Petitioners to jail. App. 60, ¶ 33; 62, ¶ 42. Petitioners further alleged in the proposed amended complaint that *the reports supporting the arrest were intentionally fabricated* by Pointon and O'Neal. App. 61, ¶ 40. The charges were never brought. App. 62, ¶ 48.

Under the foregoing facts, Petitioners alleged in the proposed amended complaint that "the arrest of [Petitioners] was not only without probable cause, but the actors including Pointon, O'Neal and the Caesars' personnel knew that there was no probable cause," App. 61-62, ¶ 40, and that "Caesars personnel and Pointon and O'Neal fabricated the charge of cheating in order to substantiate their detention of [Petitioners]," App. 62, ¶ 42.

The actual procedural history of this case is long and tortured, but necessary in order to demonstrate that the state courts applied convoluted reasoning to protect state police officers from liability on a federal claim (and as a corollary, protect gaming licensees from legitimate losses). On November 15, 2001, Petitioners filed a complaint seeking damages based upon state law claims for the two distinct, but at the time presumably related, factual episodes. *See* App. 1-23 at 1-2. As to the Caesars Palace episode, Petitioners sued O'Neal and Pointon, as well as Park Place Entertainment which did business as Caesars Palace; the publisher of the false report as to Petitioner Russo, Griffin Investigations, Inc.; and the State of Nevada/Nevada Gaming Control Board. On May 9, 2002, the trial court dismissed Gaming, Pointon and O'Neal, finding that they were immune from liability for all state law claims made against them in the complaint based upon state discretionary function immunity of Nev. Rev. Stat. § 41.032(2). *See* App. 27-30.

Petitioners timely filed a motion for reconsideration of the dismissal of the Gaming agents, or alternatively, seeking certification pursuant to Nevada Rule of Civil Procedure 54(b) and a motion to amend the complaint. The motion to amend sought to 1) add the federal cause of action against O'Neal and Pointon, the agents involved in the Caesars' incident, 2) to clarify that O'Neal and Pointon did not possess state discretionary immunity, and 3) to add state and federal claims against two other Gaming Control Board police agents involved in the Imperial Palace incident. App. 1-23 at 2-3. In their reply to the opposition to motion to amend complaint, Petitioners noted that "[i]t is axiomatic that the state immunity cannot apply to the federal cause of action under the supremacy clause, and that a state cannot statutorily enact immunity from federal claims." App. 47-49 at 48. The trial court denied the amendment against all the gaming agents as futile in light of its earlier ruling applying state discretionary immunity to the state law claims. App. 31-33; 41-46. Despite raising the federal issue in Petitioners' reply, the trial court never noted or applied the federal qualified immunity test of *Saucier*, 533 U.S. at 200-201, to the proposed § 1983 claim against O'Neal and Pointon.

The trial court granted certification pursuant to Nevada Rule of Civil Procedure 54(b) and the dismissal of Gaming and its agents, as well as the denial of the amendment as to the Gaming Agents involved in both the Caesars Palace and Imperial

Palace incidents, was appealed to the Nevada Supreme Court. App. 31-33 at 33.

The Nevada Supreme Court affirmed the dismissal of the state claims against Gaming, O'Neal and Pointon finding, without the benefit of any discovery or trial, that their conduct was not so egregious as to strip them of discretionary function immunity pursuant to Nev. Rev. Stat. 41.032(2) (2009). App. 27-30 at 28-29. Despite full briefing on the issue, the Court refused to address the denial of the amendment of the complaint stating:

> [T]he district court could certify as final, the order dismissing the Board and Agents O'Neal and Pointon; its denial of appellants' motion to amend however was not susceptible to NRCP 54(b) certification. Consequently, we lack jurisdiction to review the district court's order denying reconsideration. . . .

App. 27-30 at 28 n.4. (The ruling was unprecedented in Nevada or any other jurisprudence, appears to run afoul of the policies stated in *Zalk-Josephs Co. v. Wells Cargo*, 400 P.2d 621, 624 (1965), and appears little more than a method for the Nevada Supreme Court to avoid and delay the issue in the hope that the issue would go away.

Petitioners petitioned the Nevada Supreme Court for a rehearing of the decision in this interim appeal. As a basis for the rehearing, Petitioners argued that the dismissal concerning Pointon and

O'Neal was final pursuant to Nevada Rule of Civil Procedure 54(b) and, thus, the denial of the motion to amend the complaint was, in fact, final as to O'Neal and Pointon. *See* App. 1-23 at 6. The Nevada Supreme Court denied the petition for rehearing, *sub silentio*, reaffirming that it lacked jurisdiction to entertain the denial of the motion to amend the complaint to plead the federal cause of action. App. 26.

Despite full briefing as to all issues, the Nevada Supreme Court never applied the federal qualified immunity test of *Saucier*, 533 U.S. at 200-201, to the proposed § 1983 claim against O'Neal and Pointon (or Vincent and Pedote) in either the interim appeal nor in the order denying rehearing in the interim appeal. (Given the holding of the Nevada Supreme Court, Petitioners will refer to this first appeal as the "interim" appeal or decision in this petition.)

Meanwhile, the allegations concerning the falsity of O'Neal and Pointon's reports were subsequently proven true when, in the course of discovery as to other defendants, Gaming disclosed a "memo" from O'Neal to the district attorney which confirmed the officers' lack of evidence and an ulterior purpose with charging Petitioners with a crime.

> Traditionally, card bending cases are difficult to prove as a result of evidence (bent cards) flattening out over the course of time (days). The surveillance videotape in the majority of cases, as this one, the act of altering the card is slight and at times questionable. It's also

> argued another player may have bent the cards or even the dealer, while shuffling the cards (as they normally do).
>
> Consider a plea ***under the pretense the money is surrendered to the agency so it may be returned to Caesars Palace***.

App. 40 (emphasis added).

The trial court severed the two incidents for separate trials. The first case to go to trial was against the non-governmental defendants in the Imperial Palace incident in which the jury awarded Petitioner Grosjean compensatory and punitive damages. Various appeals arose from the conclusion of the trial, including an appeal of the denial of the amendment to plead the federal cause of action against the agents involved in the Imperial Palace incident. The issues were fully briefed and oral argument heard.

The second trial involved the non-governmental defendants in the Caesars' incident. Petitioners proposed the admission of the full version of the newly-discovered memo during this trial and the trial court admitted a redacted version. *See* App. 24. The second jury found in Petitioners' favor on compensatory damages and punitive damages liability thus confirming the fabrication of evidence. At the conclusion of this trial, Petitioners then appealed the denial of the amendment to plead the federal cause of action against the agents involved in the Caesars' incident. (The appeal concerning the agents involved in the

Imperial Palace incident had been joined with the non-governmental defendants after the Imperial Palace trial).

During the course of the appeal of the Caesars' incidents, Petitioners moved to supplement the record on appeal to include the memo indicating that the police agents knew that they were arresting Petitioners without evidence of Petitioners having committed a crime only to get Petitioners' lawful winnings back for the casino. App. 36-40. The Nevada Supreme Court granted the motion and allowed the evidence to become part of the record in the appeal against the police officers involved in the Caesars' incident. App. 24-25. The matter was again fully briefed, but oral argument was denied.

On November 20, 2007, the Nevada Supreme Court consolidated the appeals involving the Imperial Palace incident and the Caesars' incident. After supplemental briefing as directed by the Nevada Supreme Court, on May 15, 2009, the Nevada Supreme Court deconsolidated the appeals; however, the Nevada Supreme Court did not deconsolidate according to the separate incidents as the matters had been appealed, but realigned the non-governmental defendants of the Imperial Palace incident apart from the police agents of both incidents. Thereafter, the Nevada Supreme Court issued two separate opinions, publishing the appeal involving the non-governmental defendants, *Grosjean v. Imperial Palace*, 212 P.3d 1068 (Nev. 2009), but

refusing to publish the appeal of the police agents, App. 34-35.

As to Pointon and O'Neal and the amendment to plead a federal cause of action, the Nevada Supreme Court found that because Petitioners argued in seeking rehearing of the interim appeal that the motion to amend merged with the dismissal, Petitioners accepted that the interim appeal applied to the motion to amend the complaint. App. 1-23 at 6. This is despite the fact that the Nevada Supreme Court previously denied the petition for rehearing made on this ground and held, in the interim appeal, that the motion for leave to amend was not before the Court. Now finding that the dismissal order was a final order at the time of the interim appeal, the Nevada Supreme Court affirmed the decision holding that the decision in the interim appeal "stands as law of the case. . . . ," App. 1-23 at 6, and necessarily includes the denial of the motion to amend to state the federal claim. Despite briefing and supplemental briefing, the Nevada Supreme Court again refused to apply the federal qualified immunity test of *Saucier*, 533 U.S. at 200-201, to the proposed § 1983 claim involving O'Neal and Pointon.

Thus, the stature of this case is that the trial court misapplied state discretionary immunity to the proposed amended complaint asserting a federal § 1983 claim against O'Neal and Pointon. The Nevada Supreme Court refused to consider this matter in an interim appeal citing lack of jurisdiction over the denial of the motion to amend. Upon the appeal after

the conclusion of the case as to the remaining parties, the Nevada Supreme Court found that the interim appeal was final as to the dismissed police officers O'Neal and Pointon. As such, the Nevada Supreme Court found that the interim appeal, which applied state discretionary immunity to state law claims, was law of the case as to the denial of the motion to amend to add the federal claim, without any evaluation of federal qualified immunity.

There is no dispute that Petitioners repeatedly raised the issue concerning the proper governmental immunity standard to apply to the proposed federal cause of action. In the Nevada Supreme Court's decision in the final appeal in this matter, the Court acknowledged that the federal question was raised in the appeal.

> On appeal, appellants challenge the order denying them leave to amend the complaint to (1) clarify their state law claims against the State and agents O'Neal and Pointon and add a § 1983 claim against them, based on the Caesars Palace incident; and (2) add as defendants the two [Gaming] agents involved in the Imperial Palace incident, Vincent and Pedote, to assert a § 1983 and state law claims against them.

App. 1-23 at 4. As discussed more fully below, the Nevada Supreme Court has refused to address the federal question by playing games with the convoluted posture of this case.

ARGUMENT FOR GRANTING THE WRIT

By bastardizing the proceedings in this matter without a valid excuse, the Nevada Courts are protecting from liability under 42 U.S.C. § 1983 (2009) state police officers who arrested Petitioners upon fabricated evidence. The Nevada Courts have done so by misapplying state discretionary function immunity to the federal claim in conflict with relevant decisions of this Court. Sup. Ct. R. 10(c). In order to reach this result, the Nevada Supreme Court relied on grounds that are not fair or valid under state law or logic.

I. THE STATE COURTS ERRED IN REFUSING TO ENTERTAIN A FEDERAL CAUSE OF ACTION UNDER 42 U.S.C. § 1983 THROUGH APPLYING STATE DISCRETIONARY IMMUNITY RATHER THAN FEDERAL QUALIFIED IMMUNITY TO THE STATE ACTORS.

A. THE STATE COURTS APPLIED THE WRONG LAW IN EVALUATING IMMUNITY TO DENY THE AMENDMENT TO PLEAD AN ACTION UNDER 42 U.S.C. § 1983.

The state courts erred in failing to apply federal qualified immunity to the proposed § 1983 claim. As this Court has found, a state immunity statute does not control a federal cause of action even when that cause of action is made in state court. *Martinez v. California*, 444 U.S. 277, 285 (1980). This Court reasoned:

> 'Conduct by persons acting under color of state law which is wrongful under *42 U.S.C. § 1983 or § 1985(3)* cannot be immunized by state law. A construction of the federal statute which permitted a state immunity defense to have controlling effect would transmute a basic guarantee into an illusory promise; and the *supremacy clause of the Constitution* insures that the proper construction may be enforced. . . .'

Martinez, 444 U.S. at 285 n.8 (citation omitted).

In the present case, the trial court never evaluated the federal claim under federal immunity standards. The trial court dismissed Petitioners' state claims against O'Neal and Pointon based upon state governmental immunity. App. 31-33 at 32. The only immunity available for consideration for the state claims was state discretionary function immunity of Nev. Rev. Stat. § 41.032(2) (2009). In response to the dismissal, Petitioners sought reconsideration and requested an amendment to plead, among other things, a federal claim against O'Neal and Pointon under 42 U.S.C. § 1983. The state defendants argued the amendment was futile in light of the state immunity and Petitioners replied that state immunity would not apply to the federal cause of action under the Supremacy Clause. App. 47-49 at 48. At oral argument on the motion, the trial court was not, under any circumstances, going to resurrect or add any claims against O'Neal and Pointon. App. 41-46. The trial court denied the amendment as futile. App. 31-33; 41-46. In order to conclude that the

amendment was futile, the trial court was only considering the previously dismissed state claims and, consequently, applied state immunity to the proposed federal claim. Because the trial court never applied the federal qualified immunity test to the federal question, the trial court did not follow the binding precedent of this Court in *Martinez*.

The Nevada Supreme Court then compounded this error. In the final appeal, the Nevada Supreme Court refused to address the propriety of the federal cause of action due to "law of the case" given the interim appeal applying state discretionary function immunity to the dismissed state causes of action. *See* App. 1-23 at 6. "Law of the case," however, requires identical rules of law.

Under the law of the case doctrine, "'[w]hen an appellate court states a principle or rule of law necessary to a decision, the principle or rule becomes the law of the case and must be followed throughout its subsequent progress, both in the lower court and upon subsequent appeal.'" *Hsu v. County of Clark*, 173 P.3d 724, 728 (Nev. 2007). The only law addressed in the interim appeal was state discretionary function immunity. App. 27-30. By applying this law as law of the case in denying the proposed federal amendment, the Nevada Supreme Court applied state discretionary function immunity to the proposed federal amendment in order to protect the actions of O'Neal and Pointon.

This is particularly evident from the fact that the Nevada Supreme Court did not apply this circuitous reasoning to the proposed federal claim against the other gaming police agents involved in the Imperial Palace incident. As to these agents, the Nevada Supreme Court addressed the matter on the merits. App. 1-23 at 8-15. Had the appellate court only determined that the matter was final at the time of the interim appeal, the appellate court necessarily would have affirmed the dismissal as to the Imperial Palace agents. (The Nevada Supreme Court claims that "[w]ith regard to the Imperial Palace incident, no previous order dismissing any defendants was certified under Nevada Rule 54(b), so preclusion and law of the case concerns do not limit our review of the order . . . as it relates to that incident." App. 1-23 at 7. However, the trial court's order stated "[t]his certification extends to the judgment for Defendants State, Pointon and O'Neil dismissing Plaintiffs' claims, *and the denial of leave to amend seeking the addition of 42 U.S.C. 1983 claims and the addition of Pedote and Vincent as parties.*" App. 31-33 at 33 (emphasis added)). The amendment to add these agents also was pending at the time of the interim appeal; yet, because the Nevada Supreme Court did not discuss and/or apply the state immunity concerning these agents during the interim appeal, it did not apply that interim decision to these agents. Rather, it fully evaluated the proposed federal cause of action under federal qualified immunity standards. App. 1-23 at 8-15. Thus, an irreconcilable conflict

exists within the Nevada Supreme Court's decision aimed at denying Petitioners' claim.

The decision in the interim appeal concerned only state discretionary function immunity applied to the state law causes of action. The Nevada Supreme Court's reliance on that decision as law of the case demonstrates that the Nevada Supreme Court erroneously applied state discretionary function immunity to the proposed federal cause of action in direct contravention of *Martinez*, 444 U.S. at 285.

B. THE STATE ACTORS DID NOT POSSESS QUALIFIED IMMUNITY UNDER 42 U.S.C. § 1983 WHEN THE AGENTS DETAINED, ARRESTED AND SEARCHED PETITIONERS UPON INTENTIONALLY FABRICATED FACTS WITHOUT ANY LEGAL BASIS.

The request to amend the complaint to add a cause of action under 42 U.S.C. § 1983 was not futile. The proposed amended complaint set forth a claim under 42 U.S.C. § 1983 claim stating O'Neal and Pointon arrested Petitioners on trumped-up evidence in the hopes of getting Russo and Grosjean's winnings back to the casino. App. 51-78 at 74-76. This cause of action was pled against the individual agents only. App. 75, ¶ 104. *See Kentucky v. Graham*, 473 U.S. 159, 165-167 (1985). Having sued the police agents in their individual capacities, the question then turns on whether or not they are immune from liability.

This Court has found a two-prong test for qualified immunity in a claim under 42 U.S.C. § 1983 – 1) did the officer violate a constitutional right? and 2) was that right clearly established? *Saucier v. Katz*, 533 U.S. 194, 201-202 (2001). Petitioners had the Constitutional right to be free from unreasonable search and seizure. U.S. Const. amend. IV.

A violation of this right occurs if an arrest is made without probable cause. *Lee v. City of Los Angeles*, 250 F.3d 668, 685 (9th Cir. 2001). "Probable cause" is the "evidence which would 'warrant a man of reasonable caution in the belief' that a felony has been committed." *Wong Sun v. United States*, 371 U.S. 471, 479 (1963). This evaluation is based upon "facts available to the officers at the moment of the arrest." *Beck v. Ohio*, 379 U.S. 89, 96 (1964). In determining probable cause, a reasonable officer must "stand upon firmer ground than mere suspicion, . . . , though the arresting officer need not have in hand evidence which would suffice to convict. . . ." *Wong Sun*, 371 U.S. at 479.

Under the threshold question in *Saucier*, the officers, in the present case, violated the constitutional rights of Petitioners when the officers arrested them without probable cause. Under the second prong, this right was clearly established because to a reasonable officer the arrest was unlawful in the situation they confronted. In this case, the allegations show the antithesis of any suspicion and pled that the officers had to fabricate facts to even colorably claim suspicion.

Indeed, fabricating evidence to establish probable cause is patently unconstitutional. *Kingsland v. City of Miami*, 382 F.3d 1220, 1232 (11th Cir. 2004) (Arresting officers not entitled to qualified immunity in § 1983 case). The Ninth Circuit Court of Appeals has also found:

> The facts alleged by [the plaintiff] support a claim of deliberate fabrication, and thus, on the basis of the pleadings, the defendants are not entitled to qualified immunity ***as a matter of law***.

McSherry v. City of Long Beach, 423 F.3d 1015, 1021-1022 (9th Cir. 2005) (emphasis added).

Based on the facts as plead that were available at the moment of the arrest, no reasonable police officer would believe that a felony offense had been committed. Petitioners were playing and winning. App. 56, ¶ 8; 57, ¶¶ 10-11. Petitioners explained how they were winning. App. 61, ¶ 38. Even though the cards were inspected, as alleged there were no bent cards. App. 62, ¶ 41. The purportedly bent cards were not significant in the game being played. App. 59-60, ¶ 32. The police agents reviewed the surveillance film which did not show Petitioners bending cards. App. 60-61, ¶ 35. (In fact, O'Neal acknowledged that the surveillance films did not show Petitioners bending cards in his memo to the district attorney. App. 40.)

Petitioners have pled that O'Neal and Pointon fabricated reports to provide probable cause to support the arrests and regain the casino's losses. App.

60, ¶¶ 33-34; 61, ¶ 40. Given the facts available to O'Neal and Pointon, any report allegedly supporting the arrests had to be fabricated by the Gaming agents.

Petitioners supplemented the record to include evidence that buttresses the proposed allegations. O'Neal's memo to the district attorney described the lack of or tenuous evidence and the pretense for the arrest – to get Petitioners' winnings back for the casino. App. 40. Simply put, Petitioners pled that there was no probable cause to arrest and the evidence will support these allegations.

The fabrication of evidence to allegedly support an arrest, alone, is a violation of a clearly-established Constitutional right sufficient to bar any application of qualified immunity. *McSherry*, 423 F.3d at 1021-1022. Despite the repeated avoidance of the issue by the Nevada courts, O'Neal and Pointon cannot enjoy qualified immunity for these arrests.

II. THE STATE COURTS ERRED IN REFUSING TO ENTERTAIN A FEDERAL CAUSE OF ACTION UNDER 42 U.S.C. § 1983 WHEN THE PARTIES AND CONTROVERSY WERE PROPERLY BEFORE THE NEVADA SUPREME COURT AND, ABSENT A VALID EXCUSE, THE COURT AVOIDED THE CLAIM IN AN INTERIM APPEAL STATING THE ISSUE COULD ONLY BE RAISED IN A FINAL APPEAL, AND THEN, WHEN FACED WITH A FINAL APPEAL, HELD THAT THE ISSUE COULD ONLY BE ADDRESSED IN THE INTERIM APPEAL.

Petitioners seek this Court's intervention to protect their constitutional rights. The Nevada Supreme Court has not once, but twice, erroneously applied state law to the proposed federal claim and defeated Petitioners' cause of action under 42 U.S.C. § 1983. This Court "has an independent obligation to ascertain whether a judgment defeating the enforcement of federal rights rests upon a valid non-federal ground and whether that ground finds 'fair or substantial support' in state law." *Howlett v. Rose*, 496 U.S. 356, 366 n.14 (1990). The grounds the Nevada Supreme Court relied upon in avoiding the federal issue are not valid, not fair and unsupported by state law.

The Supremacy Clause of the United States Constitution establishes that the Constitution and laws of the United States are "the supreme Law of

the Land" and that the "Judges in every State shall be bound thereby." U.S. Const. art. VI, cl. 2. As such, "[a] state court may not deny a federal right, when the parties and controversy are properly before it, in the absence of a 'valid excuse'. . . . 'The existence of the jurisdiction creates an implication of duty to exercise it.'" *Howlett*, 496 U.S. at 369-370 (citations and footnotes omitted). When looking at the excuses utilized by the Nevada Supreme Court, it is evident the Court sought to prevent Petitioners from exercising their constitutional rights without a "valid excuse."

In the interim appeal of the dismissal of the state claims, the Nevada Supreme Court claimed it lacked jurisdiction to entertain the proposed federal cause of action because an order denying a motion to amend could not be certified as final under Nevada Rule of Civil Procedure 54(b). "[T]he [trial] court could certify as final, the order dismissing the Board and Agents O'Neal and Pointon; its denial of appellants' motion to amend, however, was not susceptible to [Nevada Rule of Civil Procedure] 54(b) certification. Consequently, we lack jurisdiction . . . " App. 27-29 at 28-29 n.4. That is, the denial of the amendment could not be reviewed as a final order or part of a final adjudication. In the order arising from the final appeal, the Nevada Supreme Court found that "[a]fter rehearing was denied and remittitur issued, the dismissal order in favor of the State and O'Neal and Pointon became final. . . . That decision stands as the law of the case . . . " App. 1-23 at 6. In other

words, the dismissal was final as to the motion to amend which, earlier, was not final.

The Nevada Supreme Court was wrong in concluding that "law of the case" controls in this matter and the decision was wholly unsupported by state law. The principle or rule only becomes law of the case when an appellate court "states a principle or rule of law necessary to a decision." *Hsu v. County of Clark*, 173 P.3d 724, 728 (Nev. 2007). The Nevada Supreme Court never ruled on the issue of federal qualified immunity so federal qualified immunity could not become law of the case.

Additionally, "law of the case" is not absolute, but contains a number of exceptions.

> [T]he United States Supreme Court has concluded that '[u]nder law of the case doctrine, as now most commonly understood, it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice.' Based on statements such as these, federal courts have adopted three specific exceptions to the law of the case doctrine, concluding that a court may revisit a prior ruling when (1) subsequent proceedings produce substantially new or different evidence, (2) there has been an intervening change in controlling law, or (3) the prior decision was clearly erroneous and would result in manifest injustice if enforced . . .

> . . . [M]ost [state courts] recognize that a court is not absolutely bound by the law of the case and embrace at least one or more of these exceptions, or allow departure from prior decisions if enforcement of the previous decision would cause an unjust result.

Hsu, 173 P.3d at 729. *See also Pellegrini v. State*, 34 P.3d 519, 538 (Nev. 2001).

In order to avoid the unfairness of never addressing Petitioners' federal claim, the Nevada Supreme Court should have applied these exceptions to this matter. The Nevada Supreme Court had new evidence before it. Petitioners did not have O'Neal's memo to the District Attorney at the interim appeal. The Nevada Supreme Court supplemented the record in the final appeal. App. 24-25. Yet, the Nevada Supreme Court never referenced the memo in the final decision. App. 1-23.

Additionally, the Nevada Supreme Court was wrong not to consider a proposed amended complaint with the dismissal of the complaint certified as final in the interim appeal. This decision was wholly unsupported by state law. "[W]hen a complaint can be amended to state a claim for relief, leave to amend, rather than dismissal, is the preferred remedy." *Cohen v. Mirage Resorts, Inc.*, 62 P.3d 720, 734 (Nev. 2003). *See also Shoen v. Sac Holding Co.*, 137 P.3d 1171, 1178 (Nev. 2006) (On motion to dismiss, courts considered complaint, amended complaint and proposed consolidated complaint). In order to correct the manifest injustice resulting from failing to apply the

proper rule, the Nevada Supreme Court should have considered the application of federal qualified immunity in the final appeal. (In fact, the Court did so as to the Imperial Palace agents.)

Clearly, the Nevada Supreme Court is applying non-valid excuses in order to avoid the federal question. The Nevada Supreme Court is playing games with this matter in order to avoid applying the proper federal test to the federal cause of action. Because in applying the federal test, the Nevada Supreme Court would have to acknowledge that the gaming police officers fabricated evidence and reports, not to enforce the gaming laws of the State of Nevada, but to become the private enforcement arm of the casinos. And then, not to enforce rightful debt of the casinos, but to recoup lawful winnings from patrons. When forced to deal with the federal issue in the Imperial Palace incident which did not include the fabrication of evidence and reports, the Nevada Supreme found that the agents were not entitled to absolute qualified immunity; however, the Court "emphasized" the right of the trial court to dismiss or enter summary judgment "for other reasons." App. 1-23 at 22.

The secrecy in this case also evinces that the Nevada Supreme Court is applying state rules to try to protect errant agents and not for a valid reason. Neither of the opinions involving O'Neal and Pointon were published. A request to have the final decision published was denied. App. 34-35. Additionally, the Nevada Supreme Court realigned the parties in the

appeals in this action such that the matters concerning the gaming agents would remain secret while those involving the private parties were published, even though that case also discussed qualified immunity under 42 U.S.C. § 1983. *Grosjean*, 212 P.2d 1068, 1075-1077 (Nev. 2009).

This Court should review the denial of Petitioners' proposed amended complaint to bring a cause of action under 42 U.S.C. § 1983 which the Nevada Supreme Court avoided by circuitous reasoning and not with a valid excuse.

CONCLUSION

The state courts in Nevada erroneously applied state discretionary function immunity to Petitioners' proposed federal claim under 42 U.S.C. § 1983 instead of federal qualified immunity. This directly conflicts with the decisions of this Court, *see Martinez*, 444 U.S. at 285, and the Supremacy Clause of the United States Constitution. The Nevada Supreme Court further defeated the enforcement of Petitioners' constitutional rights by circular reasoning instead of a valid excuse supported by state law.

As such, Petitioners, Michael Russo and James Grosjean, request that this Honorable Court grant writ of certiorari and reverse the Nevada Supreme

Court's decision foreclosing Petitioners' claim under 42 U.S.C. § 1983.

Respectfully submitted,

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IN THE SUPREME COURT
OF THE STATE OF NEVADA

MICHAEL RUSSO AND JAMES GROSJEAN,

Appellants,

vs.

THE STATE OF NEVADA/ NEVADA GAMING CONTROL BOARD; RODERICK O'NEAL; AND CHARLES POINTON,

Respondents.

No. 46019

ORDER AFFIRMING IN PART, REVERSING IN PART AND REMANDING

(Filed Jul. 30, 2009)

This is an appeal from district court judgment on a jury verdict in a bifurcated civil rights/tort action.[1] Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

FACTS

Appellants Michael Russo and James Grosjean filed a district court action after they were detained or arrested at two different Las Vegas casinos on separate occasions. Specifically, appellants were both

[1] The Honorable Ron D. Parraguirre, Justice, voluntarily recused himself from participation in the decision of this matter.

arrested at Caesars Palace and later jailed on charges that they were cheating at poker. Ten months later, appellant James Grosjean alone was detained by two Gaming Control Board (GCB) agents and casino security personnel at Imperial Palace, based on an alert from a third GCB agent who was interested in a suspect matching Grosjean's description. Appellants then filed a complaint, naming, among others, the two casino corporations, respondent the State of Nevada Gaming Control Board (the State), and the two GCB agents who were involved in the Caesars Palace incident, respondents Roderick O'Neal and Charles Pointon. Appellants' original complaint asserted tort claims against all of the defendants and Nevada law civil rights violations against the State and agent defendants. On August 23, 2002, the district court dismissed the claims against the State and the GCB agents, finding that they were entitled to discretionary-function immunity for any tort liability damages.

Appellants then moved for reconsideration arguing that dismissal on discretionary-function immunity grounds was inappropriate. Alternatively, they asked the court to certify the dismissal order as final, under NRCP 54(b), asserting that the dismissal entirely removed the State and the two GCB agents from the action, finally resolving appellants' claims against those parties. Within the same motion, appellants also asked for leave to amend their complaint, asserting that if the dismissal had been granted based on their failure to plead facts sufficient to

defeat immunity, their proposed amended complaint would clarify their allegations. Appellants' proposed complaint also sought to add as defendants the two GCB agents involved in the Imperial Palace detention, Anthony Vincent and Phillip Pedote, against whom Grosjean wished to assert similar state law tort and civil rights claims, and a new claim for federal civil rights violations under 42 U.S.C. § 1983 against all four GCB agents. The proposed amended complaint alleged that agents Vincent and Pedote detained Grosjean without reasonable suspicion of criminal activity and that they continued to detain him in order to examine items removed from his pockets and obtain personal information about him, even though a third GCB agent informed them that Grosjean should be released.

The district court denied reconsideration and leave to amend the complaint, finding that amendment would be futile. The court granted the motion for finality certification under NRCP 54(b) as to the dismissed claims against the State and agents O'Neal and Pointon however. Appellants then appealed.

On appeal, this court affirmed the dismissal order, concluding that the district court properly determined that discretionary-function immunity precluded appellants' state law claims against the State and agents O'Neal and Pointon. *Russo v. State, Gaming Control Bd.*, Docket No. 40216 (Order of Affirmance, November 15, 2004, and Order Denying Rehearing, February 11, 2005). This court, however, declined to consider the order denying leave to

amend, concluding that it lacked jurisdiction because such orders are not susceptible to NRCP 54(b) certification. *Id.*

Subsequently, the district court granted a motion to bifurcate the action for trial, separating the claims against the remaining Caesars Palace defendants from those against the Imperial Palace defendants. After the court entered the final judgment, this appeal followed.[2] Upon Imperial Palace's motion, the district court bifurcated the case as it related to Imperial Palace. After the trial was completed as to the Imperial Palace incident, the judgment on the jury verdict was certified as final under NRCP 54(b), and Grosjean appealed therefrom.

DISCUSSION

On appeal, appellants challenge the order denying them leave to amend the complaint to (1) clarify their state law claims against the State and agents O'Neal and Pointon and add a § 1983 claim against them, based on the Caesars Palace incident; and (2) add as defendants the two GCB agents involved in the Imperial Palace incident, Vincent and Pedote, to assert a § 1983 and state law claims against them.

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[2] After the trial was completed as to the Imperial Palace incident, the judgment on the jury verdict was certified as final under NRCP 54(b), and Grosjean appealed separately therefrom.

The Caesars Palace incident

Appellants argue that the district court should have reconsidered its August 23, 2002, order dismissing the State and agents O'Neal and Pointon from the action on immunity grounds and allowed them leave to amend the complaint to proceed with their state law tort and civil rights claims, and the proposed § 1983 claim, against those parties. As explained below, however, preclusion principles apply to foreclose such claims.

On appellants' motion, and over respondents' objection, the district court certified the August 23 order dismissing the state and its agents from the action as final under NRCP 54(b). As appellants previously acknowledged, the court was able to do so because all of the claims and issues involving those parties had been finally resolved, so that there was no reason to delay the appeal. *See* NRCP 54(b); *Mallin v. Farmers Insurance Exchange*, 106 Nev. 606, 610-11, 797 P.2d 978, 981 (1990); *see generally Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000). In that regard, when a judgment concludes a case between opposing parties, it disposes of not just the causes of action actually pleaded, but all available grounds of recovery arising from the same core facts. *Five Star Capital Corp. v. Ruby*, 124 Nev. ___, 194 P.3d 709 (2008). Appellants appealed, again treating the order as final, and this court accepted jurisdiction and affirmed the dismissal order on its merits. *See Russo v. State Gaming Control Bd.*, Docket No. 40216

(Order of Affirmance, November 15, 2004, and Order Denying Rehearing, February 11, 2005).

In their petition seeking rehearing, appellants acknowledged that the district court's finality certification applied to parties in the case, *i.e.*, the State and agents O'Neal and Pointon, and that all orders concerning those parties merged into the order dismissing them, including the subsequent order denying leave to amend the complaint to reassert the state law claims and to add a § 1983 claim against them. After rehearing was denied and remittitur issued, the dismissal order in favor of the State and O'Neal and Pointon became final, 18A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4432, at 58-59 (2d ed. 2002) (noting that "[w]hen properly entered, [Rule 54(b)] judgments are final for purposes of preclusion as well as appeal" and that the disposition "enjoys all the characteristics of the final judgment that would have been entered in less complex litigation"). That decision stands as the law of the case, and its finality precludes the district court from reconsidering the matter and appellants from bringing "a second action that presents the same claim through a better complaint." *Id.* § 4439, at 197; *see Zalk-Josephs Co. v. Wells Cargo, Inc.*, 81 Nev. 163, 171, 400 P.2d 621, 625 (1965) (explaining that a dismissal with prejudice is a final judgment on the merits, preclusive of new causes of action based on same factual scenario); *Keams v. Tempe Technical Institute, Inc.*, 16 F. Supp. 2d 1119, 1121 n.2 (D. Ariz.

1998) (explaining that when a trial court dismissed the plaintiffs' claims against certain defendants, certifying that dismissal as final under Rule 54(b), and the Court of Appeals affirmed that order, the plaintiffs could not, in an amended complaint, rename those parties as defendants because the plaintiffs claims were already dismissed in a final judgment); 10 James Wm. Moore, *Moore's Federal Practice* ¶ 54.26[2] at 54-91 (3rd ed. 2009) ("A final judgment certified and entered under the authority of Rule 54(b) is a judgment for all purposes. Accordingly, the judgment is res judicata as to the claims adjudicated. . . ."); *see also Renfro v. Forman*, 99 Nev. 70, 657 P.2d 1151 (1983) (stating that the parties who treated a judgment against them as final and appealed from it were later estopped from asserting that the judgment was not final).

The Imperial Palace incident

With regard to the Imperial Palace incident, no previous order dismissing any defendants was certified under NRCP 54(b), so preclusion and law of the case concerns do not limit our review of the order denying leave to amend the complaint as it relates to that incident. Grosjean, in seeking leave to amend, sought to add as defendants GCB agents Anthony Vincent and Phillop Pedote in order to assert a federal law claim under § 1983 and state law tort and civil rights claims against them. The parties have briefed the issues, and, at our invitation, amicus

curiae Nevada Trial Lawyers Association filed a brief on the immunity issues raised in this appeal.

Proposed federal civil rights claim under 42 U.S.C. § 1983

On appeal, Grosjean argues that the district court abused its discretion when it denied him leave to amend the complaint to add a § 1983 claim against agents Vincent and Pedote, based on purported Fourth Amendment violations. In particular, the proposed amended complaint asserted that the GCB agents deprived Grosjean of his Fourth Amendment right to be free from unreasonable searches and seizures when they detained and searched him without reasonable suspicion.

The district court's decision to deny a motion for leave to amend a complaint is reviewed for an abuse of discretion. *University & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 988, 103 P.3d 8, 19 (2004). When amendment would be futile, denying a motion for leave to amend is appropriate. *See Foman v. Davis*, 371 U.S. 178 (1962), *cited in Adamson v. Bowker*, 85 Nev. 115, 121, 450 P.2d 796, 800 (1969) (noting that "futility of amendment" is a reason to deny a motion to amend but also explaining that outright refusal to grant leave to amend without any justifying reason appearing for the denial is not an exercise of discretion but, instead, "merely abuse of that discretion"). In determining whether a proposed amendment would be futile, the same standard as that used

to determine whether a claim would be subject to dismissal under NRCP 12(b)(6) applies: we look at all of the allegations in the light most favorable to the parties proposing to amend the complaint to determine whether the allegations, if true, would entitle them to relief. *See Hampton Bays Connections, Inc. v. Duffy*, 212 F.R.D. 119, 123 (E.D.N.Y. 2003); *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. ___, ___, 181 P.3d 670, 672 (2008).

To assert a viable federal law civil rights claim under 42 U.S.C. § 1983, and establish a basis for amending his complaint, Grosjean was required to allege facts demonstrating that Vincent and Pedote, acting under color of state law, deprived him of a "right, privilege, or immunity protected by the Constitution or laws of the United States." *Butler v. Bayer*, 123 Nev. 450, 458, 168 P.3d 1055, 1061 (2007) (citing *Leer v. Murphy*, 844 F.2d 628, 632-33 (9th Cir. 1988)). Further, the agents' entitlement to immunity cannot be apparent from the proposed complaint, however, when the alleged facts support that a constitutional violation occurred, the § 1983 claim nevertheless might be defeated by an assertion of qualified immunity.

With respect to these issues, courts typically apply the two-part test set forth by the United States Supreme Court in *Saucier v. Katz*, 533 U.S. 194, 200-01 (2001); *see also Butler*, 123 Nev. at 458, 168 P.3d at 1061 (applying the *Saucier* test). Under *Saucier*, a court must decide whether the facts alleged make out a violation of a constitutional right and, if so, whether

the constitutional right at issue was "clearly established" at the time of the defendant's alleged misconduct. *Saucier*, 533 U.S. at 210; *Pearson v. Callahan*, 555 U.S. ___, ___, 129 S.Ct. 808, 817-18 (2009) (holding that appellate courts should be permitted to exercise their sound discretion in deciding, in light of the circumstances of the particular case, which of the two qualified immunity prongs should be analyzed first, but recognizing that the *Saucier* protocol, while not mandatory, "is often beneficial"). If the alleged facts indicate the violation of a clearly established constitutional right, qualified immunity does not apply to shield the government agent from liability.

In accordance with *Saucier*, in evaluating whether Grosjean's proposed complaint set forth a viable § 1983 claim, we first must determine whether, when viewed in the light most favorable to Grosjean, the facts alleged in the proposed amended complaint show that it was unreasonable for the GCB agents to detain Grosjean initially based on Stolberg's alert and to continue to detain him after being told to release him, such that his Fourth Amendment right to be free from an unlawful seizure was abridged. To determine whether a search and seizure are constitutionally reasonable under the Fourth Amendment, we balance the intrusion on a person's Fourth Amendment interests against the governmental interests served by the law enforcement agents' investigatory stop. *See Graham v. Connor*, 490 U.S. 386, 396 (1989). We therefore begin by considering the intrusion on

Grosjean's right to be secure in his own person, free from restraints or interferences of others, unless justified by authority of law. U.S. Const. amend. IV; *Terry v. Ohio*, 392 U.S. 1, 9 (1968). Grosjean's proposed amended complaint alleges that the detention was initiated without reasonable suspicion and that even if there was a reason to detain him, the detention continued beyond when the original justification for the stop ended. Thus, the proposed complaint sets forth an actionable Fourth Amendment injury under § 1983, since, in order for an investigatory stop to be lawful, the agents must have "a reasonable suspicion supported by articulable facts" of criminal activity. *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *Ramirez v. City of Buena Park*, 560 F.3d 1012, 1022-23 (9th Cir. 2009) (reversing and remanding a district court summary judgment in a § 1983 action after applying the *Saucier* test to determine that the law enforcement officer defendant was not entitled to qualified immunity from liability, since his search of the plaintiff was supported only by his "conclusory reference to 'officer safety,'" without any evidence that would provide a reasonable suspicion that the plaintiff had a weapon); *see Terry*, 392 U.S. 1.

Next, we consider the interests of the GCB, recognizing that the GCB has a legitimate interest in apprehending those suspected of violating gaming laws. Although the GCB's interests in doing so are weighty, according to the complaint there was no basis for suspecting Grosjean of violating any gaming

laws. Thus, the search and seizure alleged cannot reasonably be said to have served any law enforcement benefit that might outweigh the harm caused to Grosjean's Fourth Amendment interests. Nothing in the proposed complaint indicates that the agents had reasonable suspicion that a gaming law was going to be or had been violated. As for the continued detention, the search assertedly was completed while the GCB agents still were investigating whether Grosjean was the suspect for whom agent Stolberg was looking. Thus, it is not clear why the GCB agents would require additional time after they were instructed to release Grosjean to review the contents of Grosjean's pockets. *Florida v. Royer*, 460 U.S. 491, 500 (1983) ("It is the State's burden to demonstrate that the seizure it seeks to justify on the basis of a reasonable suspicion was sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure.").

Any intrusion on Grosjean's right to be secure in his person without any corresponding public benefit tilts the balance of interests toward unconstitutionality, we next consider the second *Saucier* inquiry, under which we determine whether a reasonable officer would have known that the detention was unlawful. Because a reasonably competent law enforcement agent should know the law governing his conduct, *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982), we must determine whether the state of the law at the time of the incident gave the GCB agents sufficient warning that their alleged misconduct was

unconstitutional. *Hope v. Pelzer*, 536 U.S. 730, 741 (2002). If reasonably competent law enforcement agents could disagree on this issue of whether the law was clear, immunity should be recognized. *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Thus, law enforcement agents are liable for their conduct only when that conduct transgresses a bright legal line. *Doe v. Broderick*, 225 F.3d 440, 453 (4th Cir. 2000). As the U.S. Court of Appeals for the Ninth Circuit recently explained, "we do not require [law enforcement agents] to act as legal experts to avoid violating the Constitution." *Brittain v. Hansen*, 451 F.3d 982, 996 (9th Cir. 2006).

Our review of relevant authority leads us to the conclusion that, by allegedly detaining Grosjean without reasonable suspicion of criminal activity, agents Vincent and Pedote may have violated a clearly established rule: an agent's act of detaining a person violates the Fourth Amendment's mandate against unreasonable seizures if it furthers no governmental interest, such as apprehending a criminal suspect or protecting an officer or the public. Relevant authority available at the time of the incident established that law enforcement agents will not be shielded by immunity if they detain a person without reasonable suspicion of criminal activity. *See United States v. Sokolow*, 490 U.S. 1, 7 (1989); *United States v. Cortez*, 449 U.S. 411, 417-18 (1981) (explaining that reasonable suspicion is "a particularized and objective basis for suspecting the particular person stopped of criminal activity"); *Terry v. Ohio*, 392 U.S. 1, 27

(1968); *cf. Florida v. J.L.*, 529 U.S. 266, 272 (2000) (noting, in the context of a stop made based on an anonymous tip, that reasonable suspicion "requires that a tip be reliable in its assertion of illegality, not just in its tendency to identify a determinate person"); *see also, e.g., Asble v. Com.*, 653 S.E.2d 285, 288 (Va. Ct. App. 2007) (concluding that an officer who identified no suspected criminal activity lacked constitutional authority to detain and search a defendant's car). Likewise, qualified immunity does not apply to law enforcement agents who detain a suspect beyond what is necessary to confirm or dispel any such suspicions. *See Illinois v. Caballes*, 543 U.S. 405, 407 (2005); *United States v. Sharpe*, 470 U.S. 675, 686 (1985); *Florida v. Royer*, 460 U.S. 491, 500 (1983); *U.S. v. Jones*, 234 F.3d 234, 241 (5th Cir. 2000) (explaining that "[t]he basis for the stop was essentially completed when the dispatcher notified the officers about the defendants' clean records, three minutes before the officers sought consent to search the vehicle. . . . [T]he failure to release the defendants violated the Fourth Amendment"); *Brown v. State*, 720 A.2d 1270, 1275-77 (Md. Ct. Spec. App. 1998) (detaining a suspect for an additional five minutes after a police officer concluded a patdown search was unreasonable under the Fourth Amendment because, once the purpose of the stop – to determine whether the suspect had drugs or weapons – was fulfilled, there was no justification to detain him further, as the suspect's actions did not raise suspicion of other crimes). Thus, the state of the law demonstrates that

a law enforcement agent must have some justification to hold a suspect.[3]

Accordingly, applying the *Saucier* standards, and accepting Grosjean's allegations as true for purposes of this appeal only, we conclude that the GCB agents were not automatically entitled to qualified immunity from Grosjean's proposed § 1983 claim. Therefore, the district court abused its discretion by concluding that amending the complaint to add a § 1983 claim against GCB agents Vincent and Pedote would be futile.

State law tort and civil rights claims

Grosjean asserts that the district abused its discretion by denying him leave to amend the complaint to assert state law tort and civil rights claims against agents Vincent and Pedote, based on its finding that

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[3] The law establishing that a GCB agent may not detain a gaming patron unless to further the legitimate governmental interest of regulating the gaming industry also is apparent from state statutes and regulations. *See, e.g.*, NRS 171.123 (limiting the scope of a agent's detention to no "longer than is reasonably necessary"); NRS 171.1231 (directing that, "[i]f, after inquiry into the circumstances which prompted the detention, no probable cause for arrest appears, [the detained] person shall be released"); NRS 289.360 (conferring the powers of a peace officer on GCB agents for the purposes of administering and enforcing gaming laws); NRS 463.140(4) (conferring power on GCB agents to investigate, for the purpose of prosecution, any suspected criminal violation of the gaming laws or suspected crimes against the property of a gaming licensee).

discretionary-function immunity would preclude any such claims against those agents.

NRS 41.032(2) discretionary-function immunity

NRS 41.032(2) grants immunity to the State and its agents who exercise or perform or fail to exercise or perform discretionary functions or duties. We recently addressed the application of discretionary-function immunity in *Martinez v. Maruszczak*, 123 Nev. 433, 168 P.3d 720 (2007). In that case, after pointing out that NRS 41.032(2) mirrors the Federal Tort Claims Act's (FTCA's) discretionary-function immunity provision, we adopted the two-part federal test articulated in two United States Supreme Court cases, *Berkovitz v. United States*, 486 U.S. 531 (1988) and *United States v. Gaubert*, 499 U.S. 315 (1991), for determining when discretionary-function immunity applies to shield a government agent from civil liability. *Martinez*, 123 Nev. at 446, 168 P.3d at 729. Under the so-called *Berkovitz-Gaubert* test, a government agent is entitled to discretionary-function immunity if his or her alleged misconduct meets two criteria. *Id.* at 445, 168 P.3d at 728.

First, the court must inquire whether the challenged conduct is truly discretionary, in that it "involve[s] an 'element of judgment or choice.'" *Id.* (quoting *Berkovitz*, 486 U.S. at 536). If the challenged conduct meets this first criterion, the court must consider the second criterion: whether the "'judgment is of the kind that the discretionary-function

exception was designed to shield,'" that is, one based on considerations of public policy. *Martinez*, 123 Nev. at 445, 168 P.3d at 728 (quoting *Gaubert*, 499 U.S. at 322-23). In determining whether a government agent is entitled to discretionary-function immunity, the "focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis." *Id.* at 325.

Proposed state law claims against agents Vincent and Pedote

The proposed amended complaint alleged that Grosjean, while undertaking no suspicious activity, was detained by Imperial Palace security officers after being instructed to do so by GCB agents Pedote and Vincent, and that although Pedote and Vincent subsequently were informed that Grosjean was not the suspect whom agent Stolberg was persuing, they nevertheless wanted to look at Grosjean's belongings and obtain personal information about him. According to the proposed complaint, Pedote, Vincent, and an Imperial Palace security officer then devised a plan, whereby Vincent and Pedote posed as Imperial Palace employees and entered the room in which Grosjean was being held to review the contents of his pockets, which had been removed and placed on a table. Analyzing those alleged decisions under the *Berkovitz-Gaubert* test's first criterion, it is clear that the agents, in determining whether Grosjean should

be detained and later whether he should continue to be detained, exercised their judgment as to the best course of action. In particular, the agents, in working with Imperial Palace security, had to determine whether to detain Grosjean based on agent Stolberg's alert that he was interested in a suspect matching Grosjean's description or to allow him to leave the premises without further investigation. Later, after confirming that Grosjean was not a suspect, the agents had to determine whether to release him or continue detaining him so they could examine the items removed from his pockets. Thus, because the detention decision involved the necessary element of judgment, it satisfies the *Berkovitz-Gaubert* test's first criterion.

Next, we must examine whether the decision fits within the test's second criterion, in that it was grounded in policy, While some courts have determined that various law enforcement decisions are entitled to discretionary-function immunity, *See, Sabow v. U.S.*, 93 F.3d 1445, 1453-54 (9th Cir. 1996) (noting that law enforcement officials are required to "consider relevant political and social circumstances in making decisions about the nature and scope of a criminal investigation"); *Kelly v. U.S.*, 924 F.2d 355, 362 (1st Cir. 1991) (concluding that, for claims brought under the Federal Tort Claims Act (FTCA), "decisions to investigate, or not, are at the core of law enforcement activity," and such judgment calls are "precisely the kind of policy-rooted decisionmaking" that discretionary-function immunity was intended to

safeguard); *Pooler v. United States*, 787 F.2d 868, 871 (3d Cir. 1986) (concluding that when a complaint is addressed to the quality of an investigation as judged by its outcome, discretionary-function immunity applies because "Congress did not intend to provide for judicial review of the quality of investigative efforts"), those decisions do not compel us to conclude that discretionary-function immunity conclusively shields all law enforcement activities involving judgment or choice. Adhering to that proposition would eviscerate the second criterion of the *Berkovitz-Gaubert* analysis and constitute a step toward allowing the discretionary-function exception to swallow the general waiver of sovereign immunity, an approach not favored by this court's precedent. *Compare ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 657-58, 173 P.3d 734, 746 (2007) (Maupin, C.J., concurring) (pointing out that restrictions on the waiver of sovereign immunity under NRS Chapter 41 must be construed narrowly), *with United States v. Nordic Village, Inc.*, 503 U.S. 30, 34 (1992) (pointing out that waivers of the government's sovereign immunity are not generally to be liberally construed and are instead construed strictly in favor of the government). Although virtually any government action can be traced back to a policy decision of some kind, an attenuated tie is not enough to show that conduct is policy-grounded. *United States v. Gaubert*, 499 U.S. 315, 325 n.7 (1991) (noting that not all discretionary acts performed by a government agent are within the discretionary-function exception because certain "acts cannot be said to be based on the

purposes that the regulatory regime seeks to accomplish"); *see Shansky v. U.S.*, 164 F.3d 688, 692-93 (1st Cir. 1999); *Cope v. Scott*, 45 F.3d 445, 448-49 (D.C. Cir. 1995).

Courts have held that when it is alleged that government agents violated constitutional rights or statutes, such immunity does not attach, since government "officials do not possess discretion to commit such violations." *Pooler v. United States*, 787 F.2d 868, 871 (3d Cir. 1986). In other words, when plaintiffs allege facts supporting that they were detained, arrested, or prosecuted illegally, without reasonable suspicion or probable cause, discretionary-function immunity does not apply because to conduct an illegal investigation or to affect an illegal arrest or prosecution does not represent a choice based on plausible policy considerations. *See Coyne v. U.S.*, 270 F. Supp. 2d 104, 112 (D. Mass. 2003) (recognizing that "'the government may not immunize an otherwise tortious action simply by showing that the government took the action in order to implement some policy purpose,'" and noting that, instead, "'courts must carefully disaggregate the government's course of conduct in order to focus on the specific action at issue and determine whether that action was truly grounded in policy'") (quoting Peter H. Schuck and James J. Park, *The Discretionary Function Exception In the Second Circuit*, 20 Quinnipiac L. Rev. 55, 73 (2000)), *reversed on other grounds by Coyne v. Cronin*, 386 F.3d 280 (1st Cir. 2004); *Shansky*, 164 F.3d at 693 (explaining that inquiry into whether a decision is

policy-based is highly "case-specific, and not subject to resolution by the application of mathematically precise formulae"); *see also, e.g., Morales v. U.S.*, 961 F. Supp. 633, 636 (S.D.N.Y 1997) (citing *Caban v. United States*, 671 F.2d 1230, 1233 (2d Cir. 1982), and concluding that the defendant drug enforcement agents were not entitled to discretionary-function immunity on the plaintiffs malicious prosecution and false arrest claims, when disputed issues remained as to whether agents had probable cause to arrest plaintiffs).

Here, since Grosjean's proposed state law claims were based on allegations that he was detained and searched without reasonable suspicion or probable cause, we have limited our inquiry to determining whether the GCB agents' actions were reasonable for Fourth Amendment purposes. In so doing, we keep in mind that the subjective intent of an agent is not relevant in evaluating whether the disputed government action is shielded by discretionary-function immunity, *United States v. Gaubert*, 499 U.S. 315, 325 (1991) ("The focus of the inquiry is not on the agent's subjective intent . . . but on the nature of the actions taken and on whether they are susceptible to policy analysis."); *see also* NRS 41.032(2) (providing that discretionary-function immunity applies "whether or not the discretion involved is abused"), and judicial review of an investigation's quality as judged by its outcome is foreclosed by the discretionary-function exception. *Pooler*, 787 F.2d at 871. Nevertheless, as explained above in the section analyzing the proposed

§ 1983 claim, since Grosjean alleged that the GCB agents detained him without reasonable suspicion of criminal activity, he has asserted a claim that the GBC agents violated a clearly established rule against unreasonable seizures. Because acting in an unconstitutional manner is not consistent with legislative policies, discretionary-function immunity is not available, *id.* (explaining that government officials do not possess discretion to commit constitutional violations), and the district court improperly concluded that leave to amend the complaint to assert state law claims against agents Vincent and Pedote would be futile. In so concluding, however, we emphasize that nothing in this order precludes the district court from later dismissing or entering summary judgment on those claims on a more developed record for other reasons.

CONCLUSION

As to the decision denying leave to amend the complaint as to the respondents involved the Caesars Palace incident, we summarily affirm the district court's decision based on preclusion and law of the case principles. With regard to the decision related to the Imperial Palace incident, we reverse the district court's order denying leave to amend the complaint to add as defendants agents Vincent and Pedote, and we remand this matter to the district court with instructions to permit Grosjean to file the proposed claims against agents Vincent and Pedote.

It is so ORDERED.

Hardesty, C.J.		Douglas, J.	
Hardesty		Douglas	
Cherry, J.		Saitta, J.	
Cherry		Saitta	
Gibbons, J.		Pickering, J.	
Gibbons		Pickering	

cc: Eighth Judicial District Court Dept. 8,
District Judge Nersesian & Sankiewicz
Attorney General Catherine Cortez Masto/
Gaming Division/Las Vegas
Eighth District Court Clerk

IN THE SUPREME COURT
OF THE STATE OF NEVADA

MICHAEL RUSSO AND JAMES GROSJEAN, Appellants, vs. THE STATE OF NEVADA/ NEVADA GAMING CONTROL BOARD; RODERICK O'NEAL; AND CHARLES POINTON, Respondents.	No. 46019

ORDER GRANTING MOTION
TO SUPPLEMENT THE RECORD

(Filed Sep. 14, 2006)

This is an appeal from a district court judgment on a jury verdict and from an order denying a motion for a new trial.

Presently before this court is appellants' unopposed motion to supplement the record on appeal with a document that appellants assert was provided to them by respondent Gaming Control Board in response to a discovery request in the underlying trial. According to appellants, a redacted version of this document subsequently was admitted as a trial exhibit and both the original and redacted versions are included in the district court record. Because the document was apparently included in the district

court record, we grant appellants' motion to supplement the record on appeal.[1]

It is so ORDERED.

/s/ Gibbons _____, A.C.J.

cc: Nersesian & Sankiewicz
Attorney General George Chanos/
Gaming Division/Las Vegas

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[1] *See* NRAP 10(c).

IN THE SUPREME COURT
OF THE STATE OF NEVADA

MICHAEL RUSSO AND JAMES GROSJEAN, Appellants, vs. THE STATE OF NEVADA/ NEVADA GAMING CONTROL BOARD; RODERICK O'NEAL; AND CHARLES POINTON, Respondents.	No. 40216

ORDER DENYING REHEARING

(Filed Feb. 11, 2005)

Rehearing denied. NRAP 40(c).

It is so ORDERED.

/s/ Becker, C.J.
Becker

/s/ Gibbons, J.
Gibbons

/s/ Douglas, J.
Douglas

/s/ Puccinelli, D.J.
Puccinelli

/s/ Blake, D.J.
Blake

cc: Hon. Lee A. Gates, District Judge
Nersesian & Sankiewicz
Attorney General Brian Sandoval/
Gaming Division/Las Vegas
Clark County Clerk

IN THE SUPREME COURT
OF THE STATE OF NEVADA

MICHAEL RUSSO AND JAMES GROSJEAN,

Appellants,

vs.

THE STATE OF NEVADA/ NEVADA GAMING CONTROL BOARD; RODERICK O'NEAL; AND CHARLES POINTON,

Respondents.

No. 40216

ORDER OF AFFIRMANCE[1]

(Filed Nov. 15, 2004)

Appeal from a district court order, certified as final under NRCP 54(b), dismissing appellants' complaint against certain parties. Eighth Judicial District Court, Clark County; Lee A. Gates, Judge.

We rigorously review an NRCP 12(b)(5) order of dismissal for failure to state a claim upon which relief

[1] The Honorable Robert E. Rose, Justice, voluntarily recused himself from participation in the decision of this matter. The Honorable Andrew J. Puccinelli, Judge of the Fourth Judicial District Court, was designated by the Governor to sit in place of the Honorable Myron E. Leavitt, Justice. Nev. Const. art. 6, § 4. The Honorable Archie E. Blake, Judge of the Third Judicial District Court, was designated by the Governor to sit in place of the Honorable A. William Maupin, Justice. Nev. Const. art. 6, § 4.

can be granted, "as this court must construe the pleadings liberally[,] . . . accept all factual allegations in the complaint as true . . . [and] draw every fair inference in favor of the non-moving party."[2] A complaint will not be so dismissed unless it appears beyond a reasonable doubt "'that the plaintiff could prove no set of facts which, if accepted by the trier of fact, would entitle him or her to relief.'"[3]

Based on our review of appellants' complaint, we conclude that the actions of Gaming Control Board Agents O'Neal and Pointon were not so sufficiently egregious as to strip them of the qualified immunity that they are entitled to under statute.[4] NRS

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[2] *Blackjack Bonding v. Las Vegas Mun. Ct.*, 116 Nev. 1213, 1217, 14 P.3d 1275, 1278 (2000) (citation omitted).

[3] *Id.* (quoting *Simpson v. Mars Inc.*, 113 Nev. 188, 190, 929 P.2d 966, 967 (1997)).

[4] Although appellants also purport to challenge the district court's order denying their motion to amend the complaint, we lack jurisdiction to consider this order. On May 9, 2002, the district court entered an order dismissing appellants' claims against the Gaming Control Board and Agents O'Neal and Pointon. In response, appellants moved alternatively for reconsideration, to amend their complaint, or for NRCP 54(b) certification. The district court denied reconsideration of its order of dismissal, reiterating that causes of action against the Board and agents had been dismissed; the court then denied in part and granted in part leave to amend the complaint, and granted NRCP 54(b) certification. Although it certified this second order as final under NRCP 54(b), Rule 54(b) only allows a court to "direct the entry of a final judgment as to one or more but fewer than all of the claims or parties." Consequently, the district court could certify as final, the order dismissing the Board and Agents O'Neal and Pointon; its denial of appellants' motion to

(Continued on following page)

41.032(2) grants qualified immunity to state officials who, in the discharge of their duties, exercise discretion, whether or not that discretion is abused.[5] The record reveals that Agents O'Neal and Pointon used their judgment to question appellants regarding their activities and ultimately decided to arrest them. The agents were conducting an investigation; their actions were inherently discretionary.[6] Accordingly, we conclude that the agents are immune from liability as to the claims set forth in the original complaint. Accordingly, we

ORDER the district court order AFFIRMED.

/s/ Shearing _____, C.J.
Shearing

/s/ Agosti _____, J.
Agosti

/s/ Becker _____, J.
Becker

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amend, however, was not susceptible to NRCP 54(b) certification. Consequently, we lack jurisdiction to review the district court's order denying reconsideration. *See, e.g., Taylor Constr. Co. v. Hilton Hotels*, 100 Nev. 207, 209, 678 P.2d 1152, 1153 (1984) (recognizing that district court does not have power to transform an interlocutory order that does not come within NRCP 54(b) into a "final judgment").

[5] *See Ortega v. Reyna*, 114 Nev. 55, 62, 953 P.2d 18, 23 (1998).

[6] *Foster v. Washoe County*, 114 Nev. 936, 941-42, 964 P.2d 788, 792 (1998).

/s/ Gibbons, J.
Gibbons

/s/ Douglas, J.
Douglas

/s/ Puccinelli, D.J.
Puccinelli

/s/ Blake, D.J.
Blake

cc: Hon. Lee A. Gates, District Judge
Nersesian & Sankiewicz
Attorney General Brian Sandoval/
Gaming Division/Las Vegas
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Attorneys for Defendants Nevada State Gaming Control Board, Roderick O'Neal and Charles Pointon

EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

* * *

MICHAEL RUSSO and JAMES GROSJEAN, Plaintiff, v. GRIFFIN INVESTIGATIONS, INC., a Nevada Corporation; IMPERIAL PALACE, INC., a Nevada Corporation; PARK PLACE ENTERTAINMENT CORPORATION, a Delaware Corporation dba Caesars Palace; RODERICK O'NEAL; STATE OF NEVADA/NEVADA GAMING CONTROL BOARD; CHARLES POINTON; and	)	Case No. A442687 Dept No. VIII

DOES I-CC, ROES I through XXX, jointly and severally,

Defendants

ORDER

(Filed Aug. 15, 2002)

Plaintiffs' Motion for Reconsideration or Alternatively Certification Pursuant to NRCP 54(b). and Motion To Amend Complaint, came on before the Court on July 16, 2002, the Honorable Lee A. Gates, presiding. The Court having considered the Motion and having found that Defendants State Gaming Control Board, Roderick O'Neal and Charles Pointon are immune from liability for all claims made against them in the Complaint,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Defendants' motion for reconsideration is denied and Plaintiffs' claims against Defendants Nevada State Gaming Control Board, Roderick O'Neal and Charles Pointon remain dismissed with prejudice.

IT IS FURTHER ORDERED that Plaintiffs' motion to amend the complaint is denied in part and granted in part. Plaintiffs' motion to amend the complaint to add claims for misappropriation of personality against Griffin Investigations, Inc., is granted. The remainder of Plaintiffs' motion to amend the complaint is denied since such amendments would be futile.

IT IS FURTHER ORDERED that Plaintiff's motion for certification pursuant to NRCP 54(b) is granted. The Court expressly finds that there is no just reason for delay and expressly directs the entry of judgment as above stated. This certification extends to the judgment for Defendants State, Pointon and O'Neil dismissing Plaintiffs' claims, and the denial of leave to amend seeking addition of the 42 U.S.C. 1983 claims and the addition of Pedote and Vincent as parties. As these claims and parties constitute the entirety of the public actors and are distinct from the balance of the action remaining, certification is appropriate.

DATED: August 9, 2002.

/s/ Lee A. Gates DC
LEE A. GATES,
DISTRICT COURT JUDGE

IN THE SUPREME COURT
OF THE STATE OF NEVADA

MICHAEL RUSSO AND JAMES GROSJEAN, Appellants, vs. THE STATE OF NEVADA/ NEVADA GAMING CONTROL BOARD; RODERICK O'NEAL; AND CHARLES POINTON, Respondents.	No. 46019

ORDER DENYING REHEARING
AND MOTION TO PUBLISH

(Filed Oct. 20, 2009)

This court entered an order affirming in part, reversing in part, and remanding this matter on July 30, 2009. Presently before this court are appellants' petition for rehearing and motion to publish that decision as an opinion.

Having considered appellants' rehearing petition, we deny it. NRAP 40(c). With regard to appellants' motion to publish, we conclude that publication is not warranted. Accordingly, we deny the motion.

It is so ORDERED.[1]

Hardesty,	C.J.	Douglas,	J.
Hardesty		Douglas	
Cherry,	J.	Saitta,	J.
Cherry		Saitta	
Gibbons,	J.	Pickering,	J.
Gibbons		Pickering	

cc: Eighth Judicial District Court Dept. 8,
District Judge
Nersesian & Sankiewicz
Attorney General Catherine Cortez Masto/
Gaming Division/Las Vegas
Eighth District Court Clerk

[1] The Honorable Ron D. Parraguirre, Justice, voluntarily recused himself from participation in the decision of this matter.

Thea Marie Sankiewicz
Nevada Bar No. 2788
Nersesian & Sankiewicz
528 South Eighth Street
Las Vegas, Nevada 89101
Telephone: 702-385-5454
Facsimile: 702-385-7667

IN THE SUPREME COURT
FOR THE STATE OF NEVADA

MICHAEL RUSSO and **JAMES GROSJEAN**, Appellants, v. **THE STATE OF NEVADA/ NEVADA GAMING CONTROL BOARD, RODERICK O'NEAL**; and **CHARLES POINTON**, Respondents,	)	Case No. 46019

APPELLANTS' MOTION TO SUPPLEMENT RECORD ON APPEAL

Appellants, Michael Russo and James Grosjean, by their attorneys, Nersesian & Sankiewicz, move to supplement the record on appeal, pursuant to NRAP 10(c), to include the attached document, Exhibit A, for the reasons set forth in the Points and Authorities below.

DATED this 3rd day of August, 2006.

Nersesian & Sankiewicz

/s/ Thea Marie Sankiewicz

Robert A. Nersesian
Nevada Bar No. 2762
Thea Marie Sankiewicz
Nevada Bar No. 2788
528 S. Eight Street
Las Vegas, Nevada 89101
Telephone: 702-385-5454
Facsimile: 702-385-7667

POINTS AND AUTHORITIES

This appeal concerns the denial of a motion to amend a complaint in response to a motion to dismiss which was granted and affirmed. Because of the posture of the case, no discovery was conducted before the Respondents were dismissed. However, because the matter proceeded to trial as to the co-defendants, Respondent, Gaming Control Board, provided discovery in response to a discovery subpoena. That discovery included the document attached as Exhibit A hereto. (A redacted version of the document was admitted as an exhibit at the trial involving co-defendants, Griffin Investigations and Desert Palace, Inc. Plaintiff's Exhibit 10C and this version was proposed as Plaintiff's Exhibit 10E; both should be available in the record below). The document is Respondent, Roderick O'Neal's notes to the district attorney regarding the reason for pursuing prosecution of his arrest of Russo and Grosjean.

While this Court is not to consider materials outside the pleadings, which in this case are the documents associated with the motion to amend the complaint, the Court can note materials that are outside the pleadings, but in the record on appeal. *Morris v. Bank of America Nevada,* 110 Nev. 1274, 1279, 886 P.2d 454 (1994). *See Gilman v. Nevada State Bd. of Veterinary Med. Examiners,* 120 Nev. Adv. Rep. 31, 89 P.3d 1000, 1003 (2004). Exhibit A is solid evidence, and only one piece, that the allegations of the proposed amended complaint are provable at the trial on the merits. As such, Appellants seek to include the Exhibit A in the record on appeal for this Court's consideration pursuant to NRAP 10(c).

DATED this 3rd day of August, 2006.

Nersesian & Sankiewicz

/s/ Thea Marie Sankiewicz

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of August, 2006, I served a copy of the Appellants' Motion to Supplement Record on Appeal upon Attorney for Respondents by depositing the same into the U.S.

Mail in Las Vegas, Nevada, postage prepaid, addressed as follows:

Antonia Cowan
Senior Deputy Attorney General
555 E. Washington Avenue, Suite #3900
Las Vegas, Nevada 89101

/s/ Amy E. Lunsford
An employee of Nersesian
& Sankiewicz

EXHIBIT A

LIAISON NOTES – NOT FOR DISCOVER

GAMING CONTROL BOARD
CASE #2000-7650-LV

Traditionally, card bending cases are difficult to prove as a result of evidence (bent cards) flattening out over the course of time (days). The surveillance videotape in the majority of cases, as this one, the act of altering the card is slight and at times questionable. It's also argued another player may have bent the cards or even the dealer, while shuffling the cards (as they normally do).

Consider a plea under the pretense the money is surrendered to the agency so it may be returned to Caesars Palace.

_____

ROD O'NEAL, AGENT DATE
ENFORCEMENT DIVISION
LAS VEGAS OFFICE

RO:mca

DISTRICT COURT

CLARK COUNTY, NEVADA

Michael Russo, et al., Plaintiffs, Vs. Griffin Investigations, Inc., Imperial Palace, Inc., Park Place Entertainment, Corp., Defendants.	)	Case No. 01-A-442687-C

TRANSCRIPT

(Filed Sept. 17, 2002)

NOW, on this 16th day of July, 2002, the above-entitled cause comes on before the Honorable Lee A. Gates, District Judge, held in Las Vegas, Nevada.

APPEARANCES:

For the Plaintiffs:	ROBERT NERSESIAN, ESQ. Nersesian & Sankiewicz 528 South Eight Street Las Vegas, Nevada 89101
For the Defendants: (State Gaming Control Board)	JENNIFER MCGARGILL, ESQ. E. 555 Washington Las Vegas, Nevada 89101
For Defendant: (Imperial Palace)	DAVID THOMAS, ESQ. Barker Brown Busby Chrisman & Thomas 300 South Fourth Street Las Vegas, Nevada 89101

[3] MS. MCGARGILL: Good morning, your Honor. Jennifer McGargill on behalf of the State Gaming Control Board and Agents Pointon and O'Neil.

MR. THOMAS: Dave Thomas on behalf of Imperial Palace.

MR. NERSESIAN: Good morning, your Honor, Robert Nersesian, attorney for the plaintiff.

THE COURT: All right. Plaintiff's motion for reconsideration: I'm going to deny that.

All right, now the 54(b) motion. Tell me this here – you know, the Supreme Court is not going to go along with it unless it's going to be determinative of the case.

MR. NERSESIAN: Your Honor, they will go along with it if it's determinative of the action against these parties. The question remains, though, if the amendment is granted, the 54(b) would admittedly be inappropriate because there would still be claims against these parties.

THE COURT: However, if the amendment is not granted, the 54(b) is –

MR. NERSESIAN: Would then be [4] appropriate.

THE COURT: I don't know – you guys don't care, do you?

MS. MCGARGILL: If the amendment isn't granted –

THE COURT: All right. We will certify a 54(b).

MR. NERSESIAN: So the amendment is denied?

THE COURT: Yes. Well –

MR. NERSESIAN: Well, Your Honor, I also – I don't care either, which way you want to go, except that the amendment –

THE COURT: I thought you wanted to get it certified. In fact, let's just do a 54(b) and see what happens, all right?

MR. NERSESIAN: Your Honor, if I could, though, the amendment does some other things, too.

Allowing for O'Neil and Pointon, the people who were dismissed, would it be my understanding that the amendment is denied as to the two additional defendants – and I forget the other person's name – under the same grounds that the original dismissal was granted?

[5] See, I thought –

THE COURT: You just said whether or not I denied the amendment on the grounds why the other two was –

MR. NERSESIAN: Your Honor, I would like to include the other two in the appeal because apparently –

THE COURT: How are you going to do that?

MR. NERSESIAN: Your Honor, if you're denying the amendment on the basis that it would be futile due to the fact that governmental discretionary immunity applies, then I can do it.

If you're denying the amendment for some other reason, then it wouldn't quite work that way.

THE COURT: Counsel, what is your opinion?

MS. MCGARGILL: I think it would be futile to grant the amendment. You have already considered state immunity with regard to two agents, the same immunity that is going to apply to other two agents he's trying to bring in.

THE COURT: All right. I'll deny the amendment, whatever reason. Then you certify all [6] of them.

MR. NERSESIAN: There is one other question: The amendment also sought to add a claim as to Griffin vis-a-vis, and there's been no opposition to this part of the amendment, a claim concerning usurpation of the personality of these individuals.

THE COURT: All right. That's granted.

MR. NERSESIAN: So I have 54(b), denial of the amendment as to the State's defendants –

THE COURT: Denial of the amendment to the two additional State defendants, denial of the motion for reconsideration, certification of the denial of the amendment, and the dismissal.

MR. NERSESIAN: Thank you, your Honor.

THE COURT: Let him prepare the order.

MS. MCGARGILL: Can I prepare the order, the one I prevailed, and then I will send it by Mr. Nersesian?

MR. NERSESIAN: I prevailed in part on all of them.

MS. MCGARGILL: I prevailed on the motion for reconsideration.

THE COURT: What do you guys think? [7] Somebody is going to put something in there that is not in there?

MR. NERSESIAN: No, I will prepare the order.

THE COURT: That's fine. Go on.

MS. MCGARGILL: Okay. Thank you.

---

[8] STATE OF NEVADA)
)
COUNTY OF CLARK)

I, JULIE M. LEVER, Court Reporter and Notary Public, in and for the County of Clark, State of Nevada, do hereby certify that the foregoing and attached pages 1-8, inclusive, comprise a true, and accurate transcript of the proceedings reported by me in the matter of Michael Russo, et al.,, Plaintiffs, versus Griffin Investigations, et al.,, Defendants; Case No. 01-A-442687, on July 16, 2002.

Dated this 14th day of September, 2002.

/s/ Julie M. Lever
Certified Shorthand Reporter
Notary Public

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8TH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

MICHAEL RUSSO and JAMES GROSJEAN, Plaintiffs, v. GRIFFIN INVESTIGATIONS, INC., a Nevada Corporation, et al Defendants.	Case No: A442687 Dept. No. XIX Date of Hearing: 2/11/02 Time of Hearing: 9:00 a.m.

REPLY TO OPPOSITION TO MOTION FOR RECONSIDERATION OR ALTERNATIVELY CERTIFICATION PURSUANT TO N.R.C.P. 54(b), AND MOTION TO AMEND COMPLAINT

* * *

III. MOTION TO AMEND

Respondents' central thesis against amendment is that the allegations remain "bald faced allegations." This is fully addressed above, and the

allegations are not "bald faced." Moreover, the fact that Respondents must resort to this hyperbolic argument indicates the lack of any proper reply to the request to amend.

Indeed, the Nevada Supreme Court has indicated that in the face of an outright dismissal, the usual course is that the plaintiff be provided an opportunity to amend. *Zalk-Josephs Co. v. Wells Cargo, Inc.* 81 Nev. 163, 169 (1965). In light of the "freely granted" language in the motion and the usual course on dismissal, amendment is certainly appropriate in the current matter.

Respondents curiously argue that the assertions pursuant to 42 U.S.C. 1983 would also prove futile for the same reasons as the State causes of actions pled against the Defendants. It is axiomatic that the state immunity cannot apply to the federal cause of action under the supremacy clause, and that a state cannot statutorily enact immunity from federal claims. The argument on futility is contrary to law and reason, and should be given no weight.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs request that the Defendants motion to dismiss be reconsidered and vacated, and that Plaintiffs be granted leave to amend to plead the amended complaint presented as well as an allegation of bad faith. In the event that these requests are each denied,

alternatively Plaintiffs request that the matter be certified pursuant to N.R.C.P. 54(b).

DATED this 1st day of July, 2002.

NERSESIAN & SANKIEWICZ

/s/ Robert A. Nersesian

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8TH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

MICHAEL RUSSO and JAMES GROSJEAN, Plaintiffs, v. GRIFFIN INVESTIGATIONS, INC., a Nevada Corporation; et al Defendants.	Case No: A442687 Dept. No. VIII Date of Hearing: *6/27/02* Time of Hearing: *9:00 a.m.*

MOTION FOR RECONSIDERATION OR ALTERNATIVELY CERTIFICATION PURSUANT TO N.R.C.P. 54(b), AND MOTION TO AMEND COMPLAINT

Plaintiffs herewith move for reconsideration of the dismissal of Pointon, O'Neil, and the State, or alternatively for certification pursuant to N.R.C.P. 54(b), and further move to amend the complaint pursuant to N.R.C.P. 15. This motion is based on the pleadings and papers on file to date, the following memorandum of

points and authorities, and any oral argument the court

* * *

EXHIBIT A

ACOM
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8TH JUDICIAL DISTRICT COURT
CLARK COUNTY NEVADA

MICHAEL RUSSO and JAMES GROSJEAN, Plaintiffs, v. GRIFFIN INVESTIGATIONS, INC., a Nevada Corporation; IMPERIAL PALACE, INC., a Nevada Corporation; PARK PLACE ENTERTAINMENT CORPORATION, a Delaware Corporation, d/b/a Caesars Palace; PHILLIP PEDOTE, ANTHONY VINCENT,	)	Case No: A442687 Dept. No. VIII

DONALD ESPENSEN, RODERICK, O'NEAL; STATE OF NEVADA/NEVADA GAMING CONTROL BOARD; CHARLES POINTON; and DOES I-CC, ROES I through XXX, jointly and severally,

Defendants.

AMENDED COMPLAINT

Plaintiffs, for their claims for relief, state as follows:

GENERAL ALLEGATIONS COMMON TO ALL CLAIMS

1. Plaintiffs are individuals who conducted activity in Clark County Nevada out of which the current case arises.

2. Defendants are all either Nevada residents, Nevada Corporations, conduct regular and systematic business in the County of Clark, State of Nevada, or are the State of Nevada through an agency of the State of Nevada.

3. Defendants, Does I-CC are individuals and entities, the names of whom are not known to Plaintiffs, who participated in the actions causing Plaintiffs injury as described below, or participants in the conspiracy alleged below, who are, as co-conspirators, liable for damages and punitive damages due Plaintiffs as participants in the conspiracy even though they may or may not have undertaken direct actions

against these Plaintiffs. Plaintiffs will seek leave to amend to name these defendants as their names are determined. These Defendants include:

a. All executives of gaming licensees in the State of Nevada who may have participated in an overt or covert plan to undertake to have the Gaming Control Board represent their interests as against professional gamblers who, through legal means, find winning strategies and methods in games of chance providing a statistical or other advantage against licensees of the State of Nevada.

b. Individual security officers of Park Place Entertainment Corporation ("Caesars"), a corporation organized and existing under the laws of the State of Delaware and authorized to transact business in the State of Nevada, who were on duty at Caesars Palace Hotel & Casino on April 21, 2000, and who interacted in the arrest and incarceration of Plaintiffs, or who participated in the fabrication of allegations upon which the arrest and incarceration of Plaintiffs were based.

c. The individual(s) at Griffin Investigations, Inc. ("Griffin"), who provided and/or entered the following false and fabricated (or determined without reasonable regard for the truth) information into the data base at Griffin (bolded portions are false and defamatory):

i. Michael J. Russo, Jr. . . . HISTORY: . . . card bending, Caribbean Stud conspiracy. . . .

ii. 1. MICHAEL J. RUSSO . . . Subject #1 is a known member of a hole card team which has been active in Las Vegas and Mississippi casinos. **They are known to work with dealers**. . . .

iii. A team of 21 **cheaters** continues to be very active in **Las Vegas**. . . . This team **cheats** on 21 tables . . . The value of the dealer's hole card is determined . . . Active members of this team are . . . Michael Russo . . .

iv. A 21 **cheating** team continues to be active in Las Vegas casinos. The team takes advantage of weak dealers who expose their hole card, and are also **believed to recruit dealers** to expose their hole card and to flash the hit card to members of the team. Identified as active members are Michael Russo, . . .

v. James Grosjean . . . HISTORY: Observed working with **card bender** on 3-Card Poker ASSOCIATES: Michael Russo

d. The individuals at Griffin who disseminated information in ¶¶ i-v above to gaming licensees of the State of Nevada, Gaming Control Board, and others.

e. Persons in a control position at Griffin who knew of the falsity of the information being

provided to subscribers and failed to control or acquiesced in information being provided to licensees when the information was known to them to be false, or to have been compiled in a manner in reckless disregard of the truth.

f. Any person who ever communicated to Griffin that Michael Russo bent cards to gain an advantage at casino games or cheated at casino games, or communicated to the Imperial Palace, Inc. ("IP"), that Grosjean was an affiliate of a known cheater (Russo).

g. The individual security agents at Imperial Palace, Inc. ("IP"), who incarcerated and battered James Grosjean ("Grosjean") on February 28, 2001.

h. Management personal at IP and Caesars who knew of the detention of Grosjean, and Russo and Grosjean, respectively, and directed the detention or failed to call a stop to the detention while it was within their power to do so.

i. Management and policy-level individuals at the State of Nevada who developed or accepted the policy of supporting and participating with gaming licensees in chilling legal gaming by professionals through illegal arrest, incarceration, battery, and imprisonment. These persons also, on information and belief, participated in a scheme, whether overt or by implication, to use information within publications by Griffin

and shared with the licensees in determining who were legitimate targets for harassment, and in furtherance of that scheme, allowed and encouraged the harassment of legal players in attempting to increase the profitability of the licensees.

4. On April 21, 2000, Plaintiffs were gambling at Caesars.

5. Plaintiff Russo is a skilled gambler, and Plaintiff Grosjean is a gaming author, student, and skilled gambler.

6. The game being played by Plaintiffs at that time was Three Card Poker.

7. Plaintiffs noticed that the dealer was receiving training for Three Card Poker, and that this training was brief and inadequate. This training included no instruction on the proper method of dealing the cards.

8. Plaintiffs noticed that the dealer, upon commencing to deal the game for the first time, was exposing his cards such that persons sitting normally at the table could see the value and suit of the cards the dealer believed were being dealt face down. Plaintiffs realized that these cards could be viewed without any special or inordinate positioning.

9. Russo and Grosjean sat down normally and proceeded to play against this dealer at about 1 p.m.

10. Russo and Grosjean bet the game accordingly, and were able to play with a substantial advantage over Caesars due to the weak dealer.

11. Over a period of hours, Grosjean and Russo won about $18,000 from Caesars.

12. On information and belief, shortly after they began playing and winning, Caesars surveillance personnel began watching Plaintiffs' play and filming the same.

13. Caesars surveillance detected no cheating, but due to a prior false publication by Griffin communicated to Caesars, Caesars recognized an opportunity to detain Plaintiffs while knowing that the Plaintiffs were not cheating and still maintain a colorable accusation of cheating.

14. On information and belief, while Plaintiffs played, Caesars traded out the cards being dealt at the table being played by Plaintiffs and examined them for evidence of bending or marking on the cards. This examination disclosed that there was no bending or marking occurring.

15. Caesars continued to subject Plaintiffs to intense scrutiny through surveillance, but found no indication of cheating.

16. Believing the Plaintiffs to be skilled, Caesars was left with the following legal options:

    a. Trespass Plaintiffs (and pay their winnings).

    b. Allow Plaintiffs to continue unimpeded (a financially disastrous course).

c. Change the dealer on Plaintiffs' game (whereupon Plaintiffs would likely leave, and take their winnings with them).

d. Train the dealer on Plaintiffs' game to handle the cards properly, and thereby eliminate the Plaintiffs' statistical advantage over Caesars.

17. Caesars chose to approach Plaintiffs and detain them at the table for about thirty minutes while Caesars personnel, including numerous Doe defendants, pondered the course of action to be taken with respect to Plaintiffs.

18. Instead of following any of the courses set forth in ¶ 16, above, Caesars detained Plaintiffs further, and escorted the Plaintiffs to a closed security office within the Caesars Hotel & Casino.

19. *At that point in time, Caesars had no reason based suspicion of cheating by either of the Plaintiffs, nor any reason based suspicion that the Plaintiffs had committed any felonies or crimes of any nature upon their premises or otherwise.*

20. Griffin purports to be a private investigations firm.

21. One of Griffin's central sources of income is the compilation and sale/lease of a publication accessed by subscription entitled the Griffin Book.

22. The Griffin Book is subscribed to by gaming licensees, and restricted from subscription by others such as the Plaintiffs.

23. Griffin has published and disseminated to Caesars and IP editions of the Griffin Book publishing the statements about Plaintiffs listed in ¶¶ 3. c. i.-v., above.

24. Russo has never cheated at gambling.

25. Russo has never bent cards in a gambling game.

26. Russo has never participated in a Caribbean Stud conspiracy.

27. Grosjean has never cheated at gambling.

28. Grosjean has never associated with a cheater known as Russo.

29. Grosjean has never been observed working or gambling with a card bender.

30. The statements of Griffin at ¶¶ 3. c. i.-v., are false, and conflict with the truth set forth in ¶¶ 23-28, above.

31. The statements of Griffin set forth at ¶¶ 3. c. i.-v., above, were made by Griffin while knowing they were false, or made with gross disregard of the truth or falsity thereof.

32. In reaching the false conclusion, and knowing that the same was false but determining that the Griffin publication concerning Russo could be used in support, Caesars and O'Neal and Pointon falsely asserted that Plaintiffs' play at the Three Card Poker game was accompanied

by card bending. Pointon stated, "The Aces and Tens are bent," even though *he knew this was false,* the game played was not blackjack and no meaningful statistical advantage could be gained by bending aces and tens.

33. Caesars and the State of Nevada *through Pointon and O'Neal* then decided to seek to arrest Plaintiffs *for* card bending, a criminal cheating activity, despite the knowledge that Plaintiffs had not cheated or bent cards.

34. The decision reached in the preceding paragraph was directed towards recouping the legally acquired winnings of the Plaintiffs, and using the legal system to 'teach Plaintiffs a lesson.' It was not undertaken to legitimately pursue a viable claim or criminal arrest or prosecution based on probable cause or any substantive circumstantial or direct evidence that there had been any card bending or cheating by either Plaintiff. A Doe Defendant employed by Caesars enlisted the aid of Defendant, State of Nevada through the Gaming Control Board ("Board") to accomplish the decision and goals stated in the preceding paragraph.

35. Defendant Roderick O'Neal ("O'Neal") and Defendant Charles Pointon ("Pointon"), police agents of the Board (hereinafter sometimes referred to in concert with the State of Nevada and/or Gaming Control Board as "State Defendants"), met with Caesars personnel, on information and belief, reviewed films of the Plaintiffs' play, inspected the cards used in the

game by Plaintiffs, and reviewed the Griffin Book for Plaintiffs' histories.

36. In viewing the films and inspecting the cards, it was patently obvious to both Pointon and O'Neal that there was no evidence of card bending *or cheating*.

37. Despite the knowledge of no card bending *or cheating*, O'Neal confronted Russo and stated, "I'm the guy who's going to take you to jail." This statement was solely made to show-off and intimidate Russo.

38. Russo and Grosjean informed Caesars personnel that their statistical advantage in the game was due to the dealer's exposure of the cards through sloppy dealing.

39. Russo and Grosjean were then separated by O'Neal and Pointon, and spoken to individually. Pointon then used direct falsehoods in an attempt to scare and intimidate Grosjean into making statements. The same interrogation tactic was then used with Russo. In short, Pointon and O'Neal were attempting to get confessions and obtain prosecutable offenses without even probable cause to detain the Plaintiffs.

40. Plaintiffs were then arrested for cheating at gambling and conspiracy to cheat at gambling. *Indeed, the arrest by Pointon and O'Neal was undertaken in bad faith, and on information and belief, the reports supporting the arrest were intentionally fabricated. Further, the arrest of the Plaintiffs was not only without probable cause, but the actors including Pointon, O'Neal*

and the Caesars' personnel knew that there was no probable cause.

41. Neither Plaintiff cheated at gambling or conspired to cheat at gambling.

42. Caesars personnel and Pointon and O'Neal fabricated the charge of cheating in order to substantiate their detention of the Plaintiffs.

43. Upon arrest, Plaintiffs were jailed in the Clark County Detention Center. Russo was held at CCDC for over 12 hours, Grosjean for over four days.

44. While jailed, Grosjean was strip-searched and inspected while naked in a shower room with other naked prisoners.

45. While jailed, Grosjean also had $2000 (four $500 chips) stolen from him as a foreseeable result of being placed in such an environment while possessing tens of thousands of dollars in legitimately earned gaming tokens in his possession.

46. Due to the false arrest and fabricated charges by the Caesars and State Defendants, Plaintiffs reasonably hired counsel to represent them with respect to the charges.

47. Plaintiffs incurred $23,000 in legal fees in preparing to defend themselves against the false and fabricated charges, *incurred loss of liberty due to their imprisonment, lost earnings opportunity during their incarceration, and suffered emotional distress.*

48. The charges were never brought, and the matter lapsed without warning nor even apology.

49. The Griffin Defendants made entries into their Griffin Book concerning Grosjean following the incidents described above.

50. Approximately ten months later, Grosjean was on the premises of Defendant, IP.

51. *On information and belief, due to the events described above, police agencies of the State of Nevada had alerted gaming licensees to notify them in the event Grosjean was seen upon their premises.*

52. *While on the premises of the IP, and while undertaking no suspicious activity whatsoever, Grosjean was seen by IP surveillance upon IP's premises.*

53. *At the time Grosjean was seen, two gaming agents of the State were also upon the premises of the IP, to-wit: The defendants, Anthony Vincent ("Vincent"), and Phillip Pedote ("Pedote").*

54. *While on the premises of the IP, and while undertaking no suspicious activity whatsoever, Grosjean was approached by IP security personnel.*

55. *IP security personnel had been instructed by Pedote and Vincent to detain Grosjean if Grosjean acted as if he were leaving the casino. This instruction was given to IP security personnel despite the fact that neither Pedote nor Vincent nor the State of Nevada possessed any probable cause to detain Grosjean.*

56. *Upon attempting to leave, despite protest, Grosjean was forced by IP security personnel to*

accompany them to a security office. Further, in escorting him to the security office against his will, Grosjean was offensively touched by the security officers of the IP and handcuffed. During the detention, the following occurred:

a. *Defendants Donald Espensen, Pedote and Vincent all became aware that there was no probable cause to detain Grosjean, and in fact, Pedote and Vincent were told by the person initiating the surveillance through the Gaming Control Board that Grosjean was to be released. Pedote and Vincent were also informed that they were to avoid making Grosjean aware that the Gaming Control Board had been involved in his detention.*

b. *After Espensen, Pedote and Vincent became aware that there was no basis to detain Grosjean, Pedote and Vincent informed Espensen that they would like to get a look at Grosjean's belongings, and further, that they were desirous of gaining personal information relevant to Grosjean.*

c. *Pedote, Vincent and Espensen then constructed an elaborate ruse whereby Vincent and Pedote would pose as employees of the IP in order to espy his belongings, and that Espensen would participate and assist in this ruse. Further, Espensen agreed to attempt to get Grosjean's personal identity information from him and forward it to Pedote and Vincent despite the knowledge*

that he had no right to further detain Grosjean.

d. *The ruse was then carried out with Grosjean continuing to be held by the IP at the direction of Pedote and Vincent despite the fact that all said actors knew that there was no reason to detain nor further detain Grosjean.*

e. *Vincent and Pedote then gained a search of Grosjean's belongings without his consent during the continued baseless and non-consensual detention of Grosjean by the IP.*

57. Grosjean and Russo are skilled gamblers, and earn money by studying and legally playing games of chance in the establishments of gaming licensees.

58. On information and belief, the only evidence that the IP had any suspicion or reason to detain Grosjean was through the false and libelous information provided to Griffin by Caesars, which libelous information was given credence through the actions of the Gaming Control Board.

59. Regardless, the information provided to the IP was not sufficient to give rise to a reasonable or legitimate suspicion that Grosjean was detainable under the laws of Nevada.

FIRST CAUSE OF ACTION – LIBEL OF GRIFFIN

60. Plaintiffs incorporate ¶¶ 1-59 as though fully restated herein word for word.

61. The statements of Griffin set forth above are false as concern Russo, and therethru are also false as to Grosjean in that they express that Grosjean is an affiliate of a known cheater and conspirator.

62. The publications of Griffin are slanderous per se as they impugn the Plaintiffs with felonious actions.

63. Both Griffin and the gaming licensees subscribing to Griffin have a vested interest in legitimate legal players being tainted with felonious activities in that it provides a basis, albeit contrived and false, for the detention and trespass of such individuals.

64. Griffin's libel of the Plaintiffs is further exacerbated by the fact that the libel was undertaken for lucre.

65. Griffin committed the aforementioned libel with malice and fraud, and understood that its statements could likely result in the oppression of imprisonment and battery upon the Plaintiffs by reason of the statements. In fact, it is the intent of Griffin and the casino defendants that Griffin publications be used to support detention, including illegal detention, and battery upon legitimate patrons of gaming licensees who are of such skill as to present a risk to the profitability of the licensees' gaming endeavors.

66. The imprisonment and other injuries including emotional distress suffered by the Plaintiffs as described above proximately resulted from the libel of Griffin.

67. Plaintiffs have also each been injured in their reputation and good name, attorneys' fees and emotional distress through the publication and through the resulting arrest.

SECOND CAUSE OF ACTION – LIBEL AND SLANDER OF CAESARS THE IMPERIAL PALACE AND THE STATE DEFENDANTS

68. Plaintiffs incorporate ¶¶ 1-67 as though fully restated herein word for word.

69. Following the detention of the Plaintiffs, on information and belief, Caesars published to Griffin and other gaming licensees of the State of Nevada that Plaintiffs had each been cheating.

70. Caesars knew that such publication was false.

71. Caesars undertook the publication with malice and fraud, and understood that the publication would likely result in the imposition of oppressive actions by others against the Plaintiffs.

72. On information and belief, Caesars also informed the State of Nevada police authorities that they believed that the Plaintiffs were cheating at Caesars' gaming tables while recognizing that the Plaintiffs were merely legally capitalizing on weakly trained Caesars personnel.

73. *The arrest of the Plaintiffs at Caesars and the detention of Grosjean at the IP each communicated to persons viewing the same that the Plaintiffs had committed illegal activity.*

74. *None of the Defendants knew of any illegal activity at the time of the detentions or arrests, nor was there any basis to detain or arrest either Plaintiff at either occasion.*

75. Plaintiffs have each been damaged in their reputation and also suffered imprisonment, emotional distress, attorneys' fees, and other injuries as a result of the slander and libel by Caesars.

THIRD CAUSE OF ACTION – FALSE IMPRISONMENT BY ALL DEFENDANTS

76. Plaintiffs incorporate ¶¶ 1-75 as though fully restated herein word for word.

77. The detention of the Plaintiffs at Caesars was with neither authority nor license.

78. The detention by Pointon and O'Neal was with neither authority nor license *and was undertaken upon less than probable cause*, and said Defendants had reviewed tapes of Plaintiffs' play such that each knew that there was no basis to arrest or detain Plaintiffs further at the time of their arrest.

79. The detention of Grosjean by the IP was with neither authority nor license, *and the continuing detention at the direction of Pedote and Vincent was undertaken without probable cause.*

Indeed, it was undertaken for the purpose of conducting an unconstitutional activity in the form of an illegal search of Grosjean's belongings.

80. Griffin fostered and in substantial part caused the illegal detention of the Plaintiffs through their false and fraudulent publication concerning Plaintiffs' gaming histories.

81. The detention at Caesars and IP, and also the detention at the Clark County Detention Center after the arrest of the Plaintiffs were all, by definition, oppressive. *Further, in undertaking their actions, Pedote, Vincent, O'Neal and Pointon, together with the remaining defendants, all acted with malice and in bad faith.*

82. As a result of the false imprisonment of the Plaintiffs, Plaintiffs have been damaged as set forth above.

FOURTH CAUSE OF ACTION – CONSPIRACY OF ALL DEFENDANTS

83. Plaintiffs incorporate ¶¶ 1-82 as though fully restated herein word for word.

84. Both the State Defendants and the Casino Defendants (a term sometimes used herein to designate the IP, Caesars and their security personnel collectively) recognize that Griffin publications are rife with erroneous information concerning individuals.

85. The Casino Defendants, together with other gaming licensees in Nevada, regularly seek to exclude legal gamblers who have studied the games offered and devised legal strategies that provide the legal gamblers with a statistical edge over the gaming licensees in the games of chance offered. Griffin and the State Defendants will oftentimes refer to this legal activity as "cheating," a "scam," a "conspiracy," etc. This occurs while, with the knowledge of said Defendants, the Supreme Court of the State of Nevada has repeatedly held that such activities are legitimate and not cheating.

86. The system of excluding gamblers runs the gambit from merely asking players to not play a particular type of game through actively seeking prosecution and fabricating bases for prosecution or arrest of legal gamblers in an attempt to protect their earnings from those gamblers and provide a deterrence to other professional gamblers who might seek to capitalize upon games offered. It has also taken the form of threats of prosecution by Nevada gaming agents acting for the benefit of licensees and threatening prosecution when no crime has occurred as leverage to gain return of legally won funds. *Additionally, as evinced by the facts of the current actions of Pedote and Vincent, gaming agents will enlist and direct gaming licensees to continue the detention of a gambler held without basis, reason nor probable cause in order that they can*

investigate the person and subject him or her to illegal searches while the licensee acts as the compliant minion with respect to the directives of the gaming agents. The licensees are thusly converted to State actors in violating the civil rights of patrons including Plaintiffs.

87. The fabrication of bases for prosecution, detention or arrest of legal gamblers is patently illegal, and presents a circumstance of what occurred with respect to the Plaintiffs and their play at Caesars described above.

88. Between the Casino Defendants, Griffin, the State Defendants, and other State gaming agents, a combination of the classic wheel *and classic* chain conspiracies exists and is ongoing. This conspiracy seeks to deter legal activities through intimidation, threats, false imprisonment and battery of legal gamblers.

89. As evidence of the conspiracy, the following exists:

    a. Regular reliance upon false Griffin information in excluding *or* arresting legal gaming patrons.

    b. Regular refusal of gaming agents of the State of Nevada to prosecute or deter false imprisonments, batteries, and illegal detentions of legal gamblers by gaming licensees. For example, if a patron is illegally detained for counting cards (a legal activity), and the patron demands that gaming agents be

called, upon the arrival of the gaming agents *or other police agencies* no action will be taken against the gaming licensee. *Indeed, Metro has placed in writing its policy of not investigating claims of detentions by patrons, and on information and belief, the Board acts similarly.*

c. Arrest of professional legal gamblers by gaming agents on patently unconstitutional charges when they are unable to determine a legitimate basis for arrest.

d. Actual intervention by gaming agents to recoup losses by licensees to a professional gambler through threats of arrest, intimidation, misstatement of the criminal code, prolonged detention, and request that the earnings be returned to the licensee.

e. Drafting of reports that reflect neither the law nor the facts, and determine that the licensee is entitled to retain the winnings of the patron.

90. All the arrests, detentions, batteries, and kidnappings described in this complaint were part and parcel of, and in furtherance of the conspiracy, *which conspiracy is ongoing and includes malice, oppression and fraud.*

91. Plaintiffs have been damaged as set forth above as a result of the conspiracy by the Defendants.

FIFTH CAUSE OF ACTION – BATTERY

92. Plaintiffs incorporate ¶¶ 1-91 as though fully restated herein word for word.

93. Without probable cause, license, consent nor authorization, Defendants, excepting Griffin, offensively and oppressively touched and/or handcuffed Plaintiffs.

94. The battery described was oppressive, and due to the fact that it was premised upon accusations known to be false *and without probable causes to even detain*, malicious.

95. Plaintiffs have been damaged through outrage, loss of freedom and emotional distress, *and as otherwise set forth above* by the battery of the Defendants.

SIXTH CAUSE OF ACTION – VIOLATION OF CIVIL RIGHTS (STATE)

96. Plaintiffs incorporate ¶¶ 1-90 as though fully restated herein word for word.

97. The search, seizure, arrest and detention of the Plaintiffs by the State of Nevada defendants and *the IP at the direction of the State of Nevada defendants*, violated Plaintiffs' *constitutional* rights:

a. To enjoy life [Nev. Const. Art. 1 § 1].

b. To acquire property [Nev. Const. Art. 1 § 1].

c. To possess property [Nev. Const. Art. 1 § 1].

d. To pursue happiness [Nev. Const. Art. 1 § 1].

e. To be free of unreasonable search. [Nev. Const. Art. 1 § 18].

f. To be free of unreasonable seizures [Nev. Const. Art. 1 § 8]

98. As a result of the violation of Plaintiffs' constitutional rights under the Constitution of the State of Nevada, the Plaintiffs have been damaged as set forth above.

99. The violations of Plaintiffs' constitutional rights by the State defendants was undertaken with malice, fraud, and oppression.

100. The acts of O'Neal, *Vincent, Pedote* and Pointon were at variance with, and outside of, the scope of their employment with the State of Nevada as governed by, and limited by, the Constitution of the State of Nevada. Nevertheless, the State of Nevada authorized and directed such activity.

101. As a result of said Defendants' violations of Plaintiffs' constitutional rights, Plaintiffs have been damaged as set forth above.

SEVENTH CAUSE OF ACTION – VIOLATION OF 42 U.S.C. 1983

102. *Plaintiffs incorporate ¶¶ 1-101 as though fully set forth herein.*

103. *The arrest of the Plaintiffs by Pointon and O'Neal constituted an unreasonable search and seizure, and cruel and unusual punishment of the Plaintiffs. The detention and continued detention of Grosjean by the IP, Espensen, Pedote and Vincent violated Grosjean's rights to be free from unreasonable search and seizure.*

104. *This cause of action is pled without the State of Nevada as a Defendant, and the defendants named herein are sued in their individual capacities.*

105. *The actions of Pointon, O'Neal, Pedote, Espensen, IP, and Vincent were of such a nature that any reasonable peace office would know that they were violative of Plaintiffs' firmly established constitutional rights. These actions include those set forth above with special reference to:*

    a. *Fabrication of facts to support an assertion of probable cause with respect to the detention by Pointon and O'Neal.*

    b. *Arresting Plaintiffs while knowing that there was no probable cause to detain let alone arrest the Plaintiffs by Pointon and O'Neal.*

    c. *Continuing a detention and conducting a search even after instructed that there was no basis for the detention and that Grosjean should be released (with respect to Pedote and Vincent).*

d. *Acting at the direction of the State agents in continuing a detention and facilitating a search even after they knew there was no probable cause to detain or search Grosjean should be released (with respect to IP).*

e. *Participating in a conspiracy and ruse to keep Grosjean upon the premises past the time that all actors knew there was no legal basis to detain him, and using this ruse to conduct complete an illegal search and seizure of Grosjean and his property.*

106. *The actions of Vincent, O'Neal, Pointon, and Pedote were undertaken with malice and oppression. The actions of the IP in this respect were undertaken with oppression. The actions of all the actors were undertaken with fraud as defined in N.R.S. § 42.005.*

107. *As a result of the violations of their constitutional rights by Pedote, Vincent, O'Neal, Pointon, Espensen, and the IP, Plaintiffs have been damaged as set forth above.*

EIGHTH CAUSE OF ACTION – MISAPPROPRIATION OF PERSONALITY

108. *Plaintiffs incorporate ¶¶ 1-106 as though fully set forth herein.*

109. *Griffin has prepared a dossier including information about well over a thousand persons.*

110. *A goodly amount of Griffin's information was gained illegally through false imprisonment of the persons included within the dossier compilation.*

111. *Griffin has also included photographs of the various persons in their dossier compilation, and this specifically includes photographs of both Plaintiffs. The photos of Plaintiffs were gained during illegal detentions.*

112. *Griffin's subscription service includes the sale of the likenesses of the persons appearing in their dossier compilation, Griffin profits from such sale and Griffin knows that the photos were often obtained without consent and during illegal detentions.*

113. *Griffin profits from the sale of Plaintiffs' likenesses, and has undertaken the same without permission of the Plaintiffs.*

114. *Griffin knows that the photos of Plaintiffs and others were obtained without consent and in violation of the privacy of those persons appearing in their publications.*

115. *Griffin's sale of Plaintiffs likenesses amounts to a misappropriation of Plaintiffs personalities and invasion of privacy.*

116. *In addition to the common law rights to restrict such use, the use by Griffin is in violation of N.R.S. § 597.810, and the Plaintiffs are entitled to the relief set forth therein inclusive of the*

removal of their photos from the Griffin publications, and the damages otherwise set forth in said statute and this Complaint.

AD DAMNUM

WHEREFORE, Plaintiffs request that this court enter judgment and award both punitive and actual damages, jointly and severally, against the defendants in an amount deemed proper by the trier of fact, permanently enjoin Griffin from selling Plaintiffs' likenesses and directing that the same be removed from all publications, and together therewith award Plaintiffs the interest, costs and attorneys' fees so wrongfully incurred in prosecuting this action.

Dated this ___ day of May, 2002.

Nersesian & Sankiewicz

/s/ _____

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Supreme Court, U.S.
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No. 09-863

IN THE SUPREME COURT OF THE UNITED STATES

MICHAEL RUSSO and JAMES GROSJEAN,

Petitioners,

v.

RODERICK O'NEAL and CHARLES POINTON,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioners incorrectly assert that the questions presented in this case are whether the Supreme Court of the State of Nevada erroneously applied discretionary immunity to a 42 U.S.C. § 1983 cause of action, and whether the Court validly declined to address a constitutional claim based on law of the case. Petitioners' Petition for Writ of Certiorari ("Pet.") at i. However, because the Nevada Supreme Court validly disposed of this matter under state-law claim preclusion principles, not law of the case principles; and, because under principles of judicial restraint a court should not decide a constitutional question if non-constitutional means validly dispose of a matter, the actual question presented for review is as follows:

Whether the Nevada Supreme Court properly affirmed, on the basis of state-law claim preclusion, a state district court's denial of Petitioners' post-dismissal motion to amend a civil complaint to include a claim pursuant to 42 U.S.C. § 1983 which was based on the same set of facts as the dismissed claims against Respondents.

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STATEMENT OF JURISDICTION

The Court does not have jurisdiction over this matter because Petitioners do not present a question of federal law. The Supreme Court of the State of Nevada properly affirmed the state district court's denial of Petitioners' post-dismissal motion for leave to amend their complaint on state-law claim preclusion principles. Therefore, Petitioners have not been denied the ability to assert any rights which they could have asserted based on the Constitution or federal statutes. *See* 28 U.S.C. § 1257.

Petitioners also state that the Nevada Supreme Court has decided an important question of federal law in a way that conflicts with a relevant decision of the Court. Pet. at 2; *see* Sup. Ct. R. 10(c). Petitioners assert that the Nevada Supreme Court did this by applying a discretionary immunity analysis to a 42 U.S.C. § 1983 claim, instead of a qualified immunity analysis. Pet. at 16-20. However, the Nevada Supreme Court did not apply any immunity analysis to § 1983 or analyze the merits of the § 1983 claim, as it did not need to address these questions based on its valid disposition of the matter on state-law claim preclusion grounds, as discussed below. Consequently, the decision of the Nevada Supreme Court only dealt with state law and its decision does not conflict with decisions of this Court.

Because Petitioners do not present a question concerning federal law, the Court does not have jurisdiction over this matter.

STATEMENT OF THE CASE

As they relate to Petitioners' Petition for Writ of Certiorari, the facts of this case are straightforward. On November 15, 2001, Petitioners filed a complaint against Respondents, and others, based on state-law causes of action. Pet. at 8. On May 9, 2002, a Nevada state district court dismissed all of Petitioners' claims against Respondents with prejudice. Pet. at 8, App. 32. Subsequently, Petitioners filed a motion for leave to amend their complaint to add a federal cause of action against the Respondents. Pet. at App. 50-51 (Motion for Reconsideration or Alternatively Certification Pursuant to NRCP 54(b), and Motion to Amend Complaint, *Russo v. Griffin Investigations, Inc.*, Case No. A442687 (8th Judicial Dist. Court) (filed May 28, 2002)). Without citing a reason, the district court denied Petitioners' post-dismissal motion for leave to amend their complaint against Respondents. Pet. at App. 31-33 (Order, *Russo v. Griffin Investigations, Inc.*, Case No. A442687 (8th Judicial Dist. Court) (filed August 15, 2002)). The proposed, additional federal claim was based on the same set of facts as the dismissed state claims. *See* Pet. at App. 6 (Order Affirming in Part, Reversing in Part and Remanding, *Russo v. State of Nevada/Nevada Gaming Control Board*, Case No. 46019 (Nev. July 30, 2009) ("Decision")); Pet. at App. 51-78 (Proposed Amended Complaint attached to Motion for Reconsideration or

Alternatively Certification Pursuant to NRCP 54(b), and Motion to Amend Complaint, *Russo v. Griffin Investigations, Inc.*, Case No. A442687 (8th Judicial Dist. Court) (filed May 28, 2002)).

Petitioners then appealed the dismissal of all claims against the Respondents to the Supreme Court of the State of Nevada. Pet. at 10. The Nevada Supreme Court affirmed the district court's dismissal of all claims against the Respondents. Pet. at 10. The Nevada Supreme Court declined to address the district court's denial of Petitioners' post-dismissal motion to amend their complaint to add a federal claim against Respondents. Pet. at 10. The remainder of Petitioners' claims, which were not against Respondents, proceeded to various final conclusions at the district court level. Pet. at 12-13.

Upon the remaining claims, asserted against other parties, reaching final, district court level conclusions, Petitioners appealed various matters to the Nevada Supreme Court, including the district court's denial of Petitioners' post-dismissal motion for leave to amend to add a federal claim against Respondents. Pet. at 12-13. The Nevada Supreme Court affirmed the district court's denial of Petitioners' post-dismissal motion for leave to amend to add a federal claim against Respondents on the grounds that state law claim preclusion principles prevented Petitioners from asserting a new claim against Respondents where all claims against Respondents had previously been dismissed and the

new claim arose out of the same set of facts as the dismissed claims.[1] Pet. at App. 5-7 (Decision).

Petitioners now attempt to appeal a decision validly grounded in state law to this Court.

ARGUMENT

In addition to the other bases discussed below, the petition for writ of certiorari should be denied because the petitioner neither shows nor argues how this case would have broad application or, indeed, any application at all beyond the particular facts and circumstances of this case. *See* Sup. Ct. R. 10. Furthermore, the petitioner points to no split of authority, nor any reason why this case is important enough to warrant this Court's attention. *See* Sup. Ct. R. 10. Any decision made by this Court would necessarily be limited to the particular facts and circumstances of this case and would have no application beyond its parameters. The only issue decided by the Supreme Court of the State of Nevada concerned the application of state law.

---

[1] The Nevada Supreme Court also affirmed the district court's denial of Petitioners' post-dismissal motion for leave to amend to "clarify" the state claims against Respondents. However, this portion of the Nevada Supreme Court's decision, as well as the portion which allowed Petitioners to add two new state defendants, are not before the Court on the Petition for Writ of Certiorari.

CERTIORARI IS NOT WARRANTED BECAUSE AFFIRMANCE BY THE SUPREME COURT OF THE STATE OF NEVADA OF DENIAL OF LEAVE TO AMEND WAS BASED ON STATE-LAW CLAIM PRECLUSION AND DOES NOT PRESENT A FEDERAL QUESTION.

Petitioners attempt to argue that a federal question is presented because the Supreme Court of the State of Nevada did not address the merits of their proposed, new, post-dismissal amended complaint containing a claim arising under 42 U.S.C. § 1983. Pet. at 16-23. Petitioners further attempt to argue that state courts denied their post-dismissal motion for leave to amend their complaint by allegedly applying the wrong immunity test to find leave to amend would be futile. Pet. at 24-29.

However, the Nevada Supreme Court did not address the constitutional questions, either on their merits or through a discretionary immunity or qualified immunity analysis, because it was able to properly dispose of the matter on grounds of state-law claim preclusion principles. Pet. at App. 5-7, 22 (Decision). "It is a well established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Escambia County v. McMillan*, 466 U.S. 48, 51 (1984) (citing *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347 (1936) (Justice Brandeis, concurring)). The Nevada Supreme Court "will not consider constitutional issues which are not necessary to the determination of an

appeal." *Spears v. Spears*, 596 P.2d 210, 212 (Nev. 1979). The Nevada Supreme Court did not decide the matter based on a constitutional analysis because it was able to validly decide the matter based on state-law claim preclusion principles. Pet. at App. 5-7, 22 (Decision). As a result, based on the above quoted authority concerning judicial restraint, the Nevada Supreme Court did not and should not have analyzed potential constitutional questions when the matter was easily disposed of on other grounds.

CERTIORARI IS NOT WARRANTED BECAUSE THE SUPREME COURT OF THE STATE OF NEVADA VALIDLY AFFIRMED DENIAL OF LEAVE TO AMEND BASED ON STATE-LAW CLAIM PRECLUSION PRINCIPLES.

Petitioners misstate the grounds on which the Supreme Court of the State of Nevada disposed of their post-dismissal motion for leave to amend their complaint to add a federal claim. Petitioners claim that the Nevada Supreme Court denied their appeal based on law-of-the-case principles. Pet. at 24-29. Petitioners' mischaracterization relies on the following quote from the Nevada Supreme Court's opinion taken out of context: "[a]fter rehearing was denied and remittitur issued, the dismissal order in favor of the State and [Respondents] became final. . . . That decision stands as the law of the case. . . ." Pet. at 25. Petitioners failed to apprise the Court of the

end of the quote and the ground upon which the Nevada Supreme Court disposed of the matter:

> [A]nd its *finality precludes* the district court from reconsidering the matter and appellants from bringing "a second action that presents the same claim through a better complaint." *Id.* [18A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4432, at 197 (2d ed. 2002)]; *see Zalk-Josephs Co. v. Wells Cargo, Inc.*, 81 Nev. 163, 171, 400 P.2d 621 625 (1965).

Pet. at App. 6 (Decision) (emphasis added). Thus, the Nevada Supreme Court's opinion reveals on its face that affirmance of the district court's denial of Petitioners' motion was grounded on state-law claim preclusion principles, not law-of-the-case.

Based on Petitioners' mischaracterization of the grounds on which they lost their appeal, Petitioners argue that the Nevada Supreme Court did not validly apply law-of-the-case principles. The argument is impertinent. In addition, Petitioners do not argue the Nevada Supreme Court's application of state-law claim preclusion in dismissing their appeal. *See* Pet. at 1-30. Petitioners also do not argue that their proposed 42 U.S.C. § 1983 claim is not based on the same set of facts as their dismissed claims against Respondents. *See* Pet. at 1-30. In fact, Petitioners do not even address the Nevada Supreme Court's state-law claim preclusion analysis in their Petition for

Writ of Certiorari. *See* Pet. at 1-30. The Nevada Supreme Court affirmed the district court's denial of Petitioners' post-dismissal motion for leave to amend their complaint to add a federal claim based on a valid application of state-law claim preclusion principles. Pet. at App. 5-7, 22 (Decision).

The Nevada Supreme Court directly addressed Petitioners' contentions concerning the propriety of answering constitutional questions regarding Petitioners' proposed 42 U.S.C. § 1983 claim against Respondents by indicating answering such questions was foreclosed because of claim preclusion principles:

> [Petitioners] argue that the district court should have reconsidered its August 23, 2002, order dismissing the State and [Respondents] from the action on immunity grounds and allowed them leave to amend the complaint to proceed with their state law tort and civil rights claims, and the proposed § 1983 claim, against those parties. As explained below, however, *preclusion* principles apply to foreclose such claims.

Pet. at App. 5 (Decision) (emphasis added).

The Nevada Supreme Court discussed how it was required to affirm the district court's denial Petitioners' post-dismissal motion: "[W]hen a judgment concludes a case between opposing parties,

it disposes of not just the causes of action actually pleaded, but all available grounds of recovery arising from the same core facts." Pet. at App. 5 (Decision) (citing *Five Star Capital Corp. v. Ruby*, 194 P.3d 709 (Nev. 2008)). "'[W]hen properly entered, [Rule 54(b)] judgments are final for purposes of preclusion as well as appeal. . . .'" Pet. at App. 6 (Decision) (parenthetically quoting 18A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure: Jurisdiction* § 4432, at 58-59 (2d ed. 2002)). "A dismissal with prejudice is a final judgment on the merits, preclusive of new causes of action based on the same factual scenario." Pet. at App. 6 (Decision) (parenthetical discussion of *Zalk-Josephs Co. v. Wells Cargo, Inc.*, 400 P.2d 621, 625 (Nev. 1965)).

> When a trial court dismissed the plaintiffs' claims against certain defendants, certifying that dismissal as final under Rule 54(b), and the Court of Appeals affirmed that order, the plaintiffs could not, in an amended complaint, rename those parties as defendants because the plaintiffs' claims were already dismissed in a final judgment.

Pet. at App. 6-7 (Decision) (parenthetically discussing *Keams v. Tempe Technical Institute, Inc.*, 16 F.Supp. 2d 1119, 1121 n.2 (D. Ariz. 1998)).

Based on this discussion the Nevada Supreme Court found that Petitioners' post-dismissal motion

for leave to amend was precluded under state-law claim preclusion principles:

> In their petition seeking rehearing, [Petitioners] acknowledged that the district court's finality certification applied to parties in the case, i.e., the State and [Respondents], and that all orders concerning those parties merged into the order dismissing them, including the subsequent order denying leave to amend the complaint to reassert the state law claims and to add a § 1983 claim against them. After rehearing was denied and remittitur issued, the dismissal order in favor of the State and [Respondents] became final. . . . That decision stands as the law of the case, and its finality precludes the district court from reconsidering the matter and appellants from bringing "a second action that presents the same claim through a better complaint."

Pet. at App. 6 (Decision) (citations omitted, but discussed above). In short, Petitioners' claims against Respondents were dismissed by the district court, the district court certified the dismissal as final, the Nevada Supreme Court affirmed the dismissal of all of Petitioners' claims against Respondents,[2] and, thus,

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[2] This affirmance refers to the Nevada Supreme Court's affirmance of the dismissal of the claims against Respondents of November 15, 2004, and not the July 30, 2009, Nevada Supreme Court Order affirming the district court's denial of Petitioner's

new claims arising from the same factual scenario are precluded based on state-law claim preclusion principles.

PETITIONERS' ARGUMENTS THAT THE SUPREME COURT OF THE STATE OF NEVADA ERRED ARE STRAW-MAN ARGUMENTS NOT BASED ON THE SUPREME COURT OF THE STATE OF NEVADA'S DECISION.

Petitioners, without addressing the Supreme Court of the State of Nevada's state-law claim preclusion analysis, try to claim that the Nevada Supreme Court invalidly applied law-of-the-case doctrine to deny Petitioners' appeal. However, while it mentioned law-of-the-case, the Nevada Supreme Court denied Petitioners' appeal based on state-law claim preclusion principles, not law-of-the-case. *See* Pet. at App. 5-7, 22 (Decision).

The Nevada Supreme Court discussed law-of-the-case only in the context of its previous decision creating a final dismissal of all of Petitioners' claims against Respondents. That is, the Nevada Supreme Court discussed law-of-the-case in passing only to show that the dismissal of the claims against Respondents was final and, thus, any new claims against Respondents are precluded based on state-law preclusion principles. *See* Pet. at App. 6 (Decision).

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post-dismissal motion for leave to amend to add a 42 U.S.C. § 1983 claim against Respondents that is the subject of Petitioners' current Petition for Writ of Certiorari.

Petitioners contend the Nevada Supreme Court's passing reference to law-of-the-case to show the finality of the previous dismissal of claims against Respondents was using law-of-the-case doctrines to rule on a qualified immunity analysis. Pet. at 26. This contention is patently unfounded. Other than to state that it was not reaching constitutional questions involving Petitioners' proposed, new § 1983 claim because the matter was validly disposed of on other grounds, the Nevada Supreme Court did not mention Petitioners' § 1983 claim. *See* Pet. at App. 5 (Decision). The Nevada Supreme Court never mentioned § 1983 in the context of law-of-the-case. *See* Pet. at App. 5 (Decision). Thus, it is unclear how Petitioners' arguments regarding law-of-the-case relate to the matter presently before the Court.

Petitioners' arguments are not grounded in the facts and law addressed by the decision of the Nevada Supreme Court concerning which Petitioners have filed their Petition for Writ of Certiorari, and, thus, do not warrant the Court granting their Petition for Writ of Certiorari.

PERCEIVED MISTATEMENTS MADE IN THE PETITION FOR WRIT OF CERTIORARI.

Supreme Court Rule 15(2) admonishes counsel "that they have an obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement made in the petition." Sup. Ct. R. 15(2). Respondents therefore point out Petitioners' misstatements below.

These factual misstatements by Petitioners find no support in the record:

1) That the Nevada Supreme Court decided this matter based on law-of-the-case. Pet. at 4, 5, 14.
2) That the Nevada Supreme Court "intentionally protected state police agents who blatantly violated Petitioners' constitutional rights by manufacturing evidence with an ulterior purpose of recouping gaming losses for a casino through charging Petitioners with a crime they never committed. The Nevada Courts are protecting reprehensible police misconduct by repeatedly failing to apply the test for qualified immunity to the federal cause of action." Pet. at 4.
3) That the district court stated any reason, including discretionary immunity, for denying Petitioners' post-dismissal motion for leave to amend to add a § 1983 claim. Pet. at 5, 9, 14, 16, 17, 18, 29.
4) That "the allegations concerning the falsity of [Respondents'] reports were subsequently proven true . . ." by a memo disclosed subsequent to the dismissal of all of Petitioners' claims against Respondents. Pet. at 11.
5) That the Nevada Supreme Court's mention of the doctrine of law-of-the-case in passing was in any way related to a finding concerning discretionary immunity applied to a proposed § 1983 claim. Pet. at 15, 16, 18, 20.

6) That the Nevada Supreme Court's mention of the doctrine of law-of-the-case in passing was in any way related to a finding concerning qualified immunity. Pet. at 18, 26.
7) That there is an irreconcilable conflict in the Nevada Supreme Court's decision concerning Respondents and the Gaming Control Board agents, who had previously not been named in Petitioners' action, that the Nevada Supreme Court allowed Petitioners to add to their complaint. Pet. at 19-20.
8) That Respondents violated any of Petitioners' constitutional rights. Pet. at 21.
9) That Respondents fabricated any facts. Pet. at 21, 23.
10) That the Nevada Supreme Court decided this matter primarily on the doctrine of law-of-the-case. Pet. at 26.
11) That Respondents fabricated evidence and reports, declined to enforce gaming laws, and were the "private enforcement arm of the casinos." Pet. at 28.
12) That Respondents acted in concert with casinos to deprive patrons of their lawful winnings. Pet. at 28.
13) That "[t]he secrecy in this case also evinces that the [Nevada Supreme Court] is applying state rules to try to protect errant agents and not for a valid reason." Pet. at 28.

Certain opinions expressed by Petitioners that might be construed as misstatements are as follows:

1) That the Nevada Supreme Court engaged in unfounded legal maneuverings. Pet. at 4.
2) That Nevada "state courts applied convoluted reasoning to protect state police officers from liability on a federal claim (and as a corollary, protect gaming licensees from legitimate losses)." Pet. at 8.
3) That the Nevada Supreme Court applied any methods in this case to avoid and delay issues in the hope that they would go away. Pet. at 10.
4) That said memo "confirmed [Respondents'] lack of evidence and an ulterior purpose with charging Petitioners with a crime." Pet. at 11.
5) That a jury verdict against the defendants remaining in the matter after all of Petitioners' claims against Respondents were dismissed confirmed that evidence was fabricated. Pet. at 12.
6) That the Nevada Supreme Court "played games" in declining to address the potential constitutional questions Petitioners attempted to raise. Pet. at 15, 28.
7) That the Nevada Supreme Court protected Respondents from § 1983 liability "[b]y bastardizing the proceedings in this matter without a valid excuse..." Pet. at 16.
8) That the Nevada Supreme Court "relied on grounds that are not fair or valid under state law or logic" in reaching its result. Pet. at 16, 24, 25, 28.

9) That the Nevada courts erred in not analyzing constitutional questions of qualified immunity in this matter. Pet. at 16.
10) That the proposed amendment concerning adding a § 1983 action against Respondents was not futile. Pet. at 20.
11) That the facts Petitioners proposed be added to their complaint would have shown no reasonable officer would believe a felony offense had occurred. Pet. at 22.
12) That the Nevada Supreme Court used invalid excuses "to prevent Petitioners from exercising their constitutional rights. . . ." Pet. at 25.
13) That the Nevada Supreme Court declined to publish its opinion concerning respondents so "that the matters concerning the gaming agents would remain secret. . . ." Pet. at 29.
14) That the Nevada Supreme Court avoided considering the merits of Petitioners' proposed § 1983 claim against Respondents "by circuitous reasoning and not with a valid excuse." Pet. at 29.

CONCLUSION

The Court should not grant Petitioners' Petition for Writ of Certiorari. The decision of the Supreme Court of the State of Nevada was grounded in state law and does not present a federal question. The Nevada Supreme Court's decision validly

affirmed denial of leave to amend based on state-law preclusion principles. Petitioners only present a law-of-the-case straw-man argument to try to defeat the validity of the Nevada Supreme Court's decision. Thus, the Court should not grant Petitioners' Petition for Writ of Certiorari in the above captioned matter.

Respectfully submitted.

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No. 09-863

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In The

Supreme Court of the United States

MICHAEL RUSSO and JAMES GROSJEAN,

Petitioners,

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RODERICK O'NEAL and CHARLES POINTON,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Nevada

REPLY TO BRIEF IN OPPOSITION TO PETITON FOR WRIT OF CERTIORARI

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ARGUMENT FOR GRANTING THE WRIT

The Nevada Supreme Court played with state law in order to avoid addressing the federal claim of Petitioners, Michael Russo and James Grosjean. State courts have a duty to enforce federal law. *Howlett v. Rose*, 496 U.S. 356, 369-370 (1990). Contrary to the assertion of Respondents, Roderick O'Neal and Charles Pointon, the Nevada Supreme Court did not validly apply state law. Under the pretense of using state law, the Nevada Supreme Court did not address the federal claim in the interim appeal claiming a lack of jurisdiction to review a proposed amendment to add a federal claim. Later, the Nevada Supreme Court avoided addressing the federal claim by asserting preclusion based on the earlier appeal. Respondents assume that the actions of the Nevada Supreme Court were valid relying on the erroneous analysis of the Nevada Supreme Court. This Court "has an independent obligation to ascertain whether a judgment defeating the enforcement of federal rights rests upon a valid non-federal ground and whether that ground finds 'fair or substantial support' in state law." *Howlett*, 496 U.S. at 366 n.14. The Nevada Supreme Court invalidly applied state law that is neither fair nor supportable.

Respondents rely solely on this procedural error and do not substantively address whether federal qualified immunity applied or not to the Petitioner's proposed claim under 42 U.S.C. § 1983 (2009). The state courts erroneously applied the analysis for state discretionary immunity, Nev. Rev. Stat. § 41.032(2)

(2009), to the proposed federal claims. Pet. at 16-20. ("Pet." references the Petition for Writ of Certiorari.) Under the federal qualified immunity test of *Saucier v. Katz*, 533 U.S. 194, 201-202 (2001), the state courts erred in denying and affirming the denial of the proposed amended complaint where the state agents are not immune as a matter of law. *See* Pet. at 20-23.

Petitioners fully supported their arguments with citations to the documents in the Appendix. As to Respondents' contention that Petitioners misstated any fact in this matter, Opp. 13-16, Respondents give no support for these allegations. ("Opp." references the Opposition to Petition for Writ of Certiorari.) This matter arose from a motion to amend a complaint in response to a motion to dismiss. The "facts" come from 1) a document with which the Nevada Supreme Court allowed Petitioners to supplement the record and 2) the allegations from the proposed amended complaint. Alternatively, the "facts" are arguments.

I. LAW OF THE CASE IS THE PRECLUSION DOCTRINE THAT THE NEVADA SUPREME COURT MISAPPLIED IN ORDER TO AVOID THE FEDERAL ISSUE, NOT CLAIM PRECLUSION.

Petitioners did not mischaracterize the grounds upon which the Nevada Supreme Court avoided applying qualified immunity to the proposed 42 U.S.C. § 1983 claim in the second appeal. The Nevada

Supreme Court concluded that it was affirming the denial of the motion to amend the complaint "based on preclusion **and law of the case principles**." Pet. App. 1-23 at 22 (emphasis added). ("Pet. App." refers to the documents included in the Appendix to the Petition for Writ of Certiorari.). The Nevada Supreme Court found that "[t]hat decision [the interim appeal] stands **as the law of the case**. . . ." Pet. App. 1-23 at 6 (emphasis added). These are not "straw-man arguments" nor a "passing reference" by the Nevada Supreme Court. Opp. at 11-12.

The remainder of this quote does not change the basis of the holding from law of the case doctrine to claim preclusion as Respondents contend. Opp. at 7. The quote, in its entirety, states: "That decision [the interim appeal] stands as law of the case, and its finality precludes the district court from reconsidering the matter and appellants from bringing 'a second action that presents the same claim through a better complaint.'" Pet. App. 1-23 at 6. Like claim preclusion, the law of the case doctrine is a preclusion doctrine. *See Glinka v. Mercedes-Benz Credit Corp. (In re Kelton Motors, Inc.)*, No. 89-00255, 1990 Bankr. LEXIS 1531, at *15 (Bankr. D. Vt. June 25, 1990); *In re Republic Fabricators, Inc.*, 104 B.R. 933, 947 (Bankr. N.D. Ind. 1989); *People v. Lyles*, 567 N.E.2d 396, 399 (Ill. App. Ct. 1990); *Poet v. Thompson (In re Thompson)*, 144 P.3d 1067, 1071 (Or. Ct. App. 2006). As such, when the Nevada Supreme Court referenced "precludes", the Nevada Supreme Court applied the referenced "law of the case." The Nevada Supreme

Court was making a conclusion at variance with its own law, and not providing a new theory of preclusion as the basis of the decision.

No other reading makes sense. Claim preclusion "is triggered when a judgment is entered." *Univ. of Nevada v. Tarkanian*, 879 P.2d 1180, 1191 (Nev. 1994). "Pursuant to the rule of claim preclusion, '[a] valid and final judgment on a claim **precludes a second action** on that claim or any part of it.'" *Executive Mgmt., Ltd. v. Ticor Title Ins. Co.*, 963 P.2d 465, 473 (Nev. 1998) (citation omitted) (emphasis added). In order to evaluate a claim preclusion defense, there is a three-part test, to wit: "(1) the same parties or their privies are involved in both cases, (2) a valid final judgment has been entered, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case." *Five Star Capital Corp. v. Ruby*, 194 P.3d 709, 714 (Nev. 2008).

In this case, there was a dismissal of the state law claims, a timely-filed motion for reconsideration with a motion to amend, which upon denial, resulted in a judgment. *See* Pet. App. 31-33; Pet. App. 50-78; and, App. 5-6. ("App." refers to additional documents attached in an appendix hereto.) **There is, was and has ever been only one lawsuit.** There is no "subsequent action" as required by the third part of the test for claim preclusion and implied by the first part of the test referencing "both cases." Additionally, there was no "final judgment" under the second part of the test when the trial court first ruled on the

issue. The trial order appealed from, Pet. App. 31-33, predates (August 15, 2002) the judgment against Respondents (August 23, 2002), App. 5-6. (Even though this judgment was certified final for the interim appeal pursuant to Nevada Rule of Civil Procedure 54(b), the Nevada Supreme Court found that certification could not apply to the order denying the motion for reconsideration of the dismissal and to amend the complaint. Pet. 27-30 at 28-29 n.4.) Without a subsequent proceeding, claim preclusion simply does not apply.

The Nevada Supreme Court's references to "law of the case" acknowledge that the only arguably applicable theory of preclusion was the law of the case doctrine applying the decision from interim appeal. "The law-of-the-case doctrine provides that when an appellate court decides a principle or rule of law, that decision governs the same issues in subsequent proceedings in that case." *Dictor v. Creative Mgmt. Serv., LLC*, No. 51778, 2010 Nev. LEXIS 3, at *5 (Nev. Feb. 4, 2010); *Hsu v. County of Clark*, 173 P.3d 724, 728 (Nev. 2007).

Petitioners did not burden the Court with nonsensical arguments about a nonapplicable preclusion theory. As Petitioners are seeking the review of the denial of a motion to amend and not the dismissal of a second lawsuit, the only preclusion theory is law of the case and not claim preclusion. The premise of Respondents' Opposition fails in its entirety.

II. THE NEVADA SUPREME COURT MISAPPLIED THE STATE LAW PRECLUSION DOCTRINES IN ORDER TO AVOID THE FEDERAL QUESTION.

Admittedly the decision of the Nevada Supreme Court purports to be based on the application of a state procedural basis rather than a decision on the merits. Nevertheless, because the decision contradicts the Nevada Supreme Court's own prior and subsequent case law, is unpublished and has the effect of foreclosing a federal claim against state agents, the conclusion is inescapable that the Nevada Supreme Court merely fabricated a contrivance to extricate Respondents from answering for their federal tort in avoidance of having to apply federal law to the action of state employees. Regardless of what the preclusion theory is called, the Nevada Supreme Court could not validly apply any preclusion. To allow any court to claim a lack of jurisdiction to avoid a federal question in an interim appeal and then to claim that that interim appeal gave preclusive effect in the appeal from the final judgment is the epitome of unfairness and unreasonableness.

A. MISAPPLICATION OF CLAIM PRECLUSION

If Respondents are correct that the Nevada Supreme Court was attempting to apply claim preclusion, then this is more support for Petitioners' argument that the Nevada Supreme Court contrived state law to avoid the federal claim. By its own test

for claim preclusion, the Nevada Supreme Court needed a second lawsuit which did not exist in this case. *Five Star Capital Corp.*, 194 P.3d at 713-14 ("[C]laim preclusion applies to preclude an entire second suit . . . "). As such, the Nevada Supreme Court, definitionally, would have been misapplying state law in order to avoid the federal claim. The review sought was of a denial of a motion to amend a complaint, not a dismissal or a judgment from a second lawsuit.

Further, the Nevada Supreme Court could not have relied upon its own decision in the interim appeal as giving rise to claim preclusion. In the interim decision, the Nevada Supreme Court stated that it lacked jurisdiction at that point to consider any order other than the certified dismissal of the state claims pursuant to state discretionary function immunity. Pet. App. 27-30 at 28 n.4.

A decision based upon lack of jurisdiction cannot support claim preclusion.

> '[O]rdinarily a judgment dismissing an action or otherwise denying relief for want of jurisdiction . . . does not preclude a subsequent action in a court of competent jurisdiction on the merits of the cause of action originally involved.' . . . If the court in which an action is brought has no jurisdiction of the subject matter, the suit must be dismissed; 'in such cases the dismissal is not a determination of the claim, but rather a refusal to

> hear it, and the plaintiff is free to pursue it in an appropriate forum.'

Sewell v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 94 F.3d 1514, 1518 (11th Cir. 1996) (citations omitted). *See also Xerox Corp. v. Genmoora Corp.*, 888 F.2d 345, 352 n.29 (5th Cir 1989).

The Nevada Supreme Court has adopted this rule. "While the requirement of a valid final judgment does not necessarily require a determination on the merits, it does not include a case that was dismissed without prejudice or for some reason (jurisdiction, venue, failure to join a party) that is not meant to have preclusive effect." *Five Star Capital Corp.*, 194 P.3d at 713 n.27. *See also Brennan v. EMDE Medical Research, Inc.*, 652 F. Supp. 255, 265 (D. Nev. 1986) ("[T]he Court finds that the Supreme Court of the State of Nevada would not give a Nevada court judgment preclusive effect over matters in which the state courts were not jurisdictionally competent.") In the present matter, because the Nevada Supreme Court found that it lacked jurisdiction at the time of the interim appeal to entertain the denial of the proposed amended complaint to assert the federal claim, the interim appeal could not have any preclusive effect as to the federal question under the extant published Nevada authority.

Indeed, before allowing briefing in the final appeal, the Nevada Supreme Court acknowledged that the decision in the interim appeal was not preclusive.

> Although NRAP 3A(b) does not provide for an independent appeal from an interlocutory order denying a motion for leave to amend a complaint, **when an appeal is taken from a final judgment, an interlocutory order may then be challenged on appeal**. Although appellants are not technically aggrieved by the final judgment, they are aggrieved by the interlocutory order denying their motion to amend, **which can only be challenged in the context of an appeal from the final judgment**. Consequently, we conclude that appellants are aggrieved parties with standing to appeal.

App. 1-4 at 3-4 (citation omitted) (emphasis added). (By finding standing, the Nevada Supreme Court essentially found no claim preclusion. *See Johnson v. Dep't. of Veterans Affairs*, No. CIV-08-430-RAW, 2009 U.S. Dist. LEXIS 33109 (E.D. Okla. Apr. 17, 2009), *aff'd on other grounds*, No. 09-7054, 2009 U.S. App. LEXIS 23749 (10th Cir. Oct. 28, 2009); *Thomas v. Bray*, 400 P.2d 679, 680 (Colo. 1965).)

If the Nevada Supreme Court applied claim preclusion in this matter to defeat the enforcement of Petitioners' federal rights as Respondents contend, then the Nevada Supreme Court was not applying valid non-federal law. Claim preclusion, given the procedural posture of a review of a motion to amend a complaint, was definitionally not applicable. Claim preclusion, given the Nevada Supreme Court's refusal to address the amendment as jurisdictional, was not applicable.

B. MISAPPLICATION OF LAW OF THE CASE DOCTRINE

Since the filing of the Petition for Writ of Certiorari in this matter, the Nevada Supreme Court has filed a decision that dictates the parameters of the law of the case doctrine. That decision further demonstrates that the Nevada Supreme Court did not properly consider or apply those parameters in the present case.

In *Dictor v. Creative Mgmt. Serv., LLC,* No. 51778, 2010 Nev. LEXIS 3, at *5-6 (Nev. Feb. 4, 2010), the Nevada Supreme Court stated:

> The law-of-the-case doctrine provides that when an appellate court decides a principle or rule of law, that decision governs the same issues in subsequent proceedings in that case. . . . **In order for the law-of-the-case doctrine to apply, the appellate court must actually address and decide the issue** explicitly or by necessary implication. . . . However, the doctrine does not bar a district court from hearing and adjudicating the issues not previously decided, . . . , **and does not apply if the issues presented in a subsequent appeal differ from those presented in a previous appeal**.

Dictor, at *5-6 (citations omitted) (emphasis added). (The Nevada Supreme Court followed the previous decision of *Hsu v. County of Clark*, 173 P.3d 724, 728 (2007). *Dictor*, at *5-6.)

In the present matter, the Nevada Supreme Court did not address the issue of federal qualified immunity as it concerned the 42 U.S.C. § 1983 claim in the proposed amended complaint in the interim appeal. The Nevada Supreme Court explicitly refused to consider the issue citing a lack of jurisdiction. The only issue addressed in the interim appeal was state discretionary function immunity as it applied to the state law claims. The law of the case doctrine cannot be validly applied to the federal question.

Had the Nevada Supreme Court been seriously applying the state law of the case doctrine to this matter, the Nevada Supreme Court would have written the quote from *Dictor* in its opinion in the present matter, decided approximately six months prior to *Dictor*. However, if it had, the Nevada Supreme Court would have been forced to acknowledge the defects with the law of the case doctrine in this matter and would have had to decide that federal qualified immunity would not bar the proposed 42 U.S.C. § 1983 claim. The Nevada Supreme Court would have been forced to acknowledge the document authored by the state officers that the officers lacked evidence to arrest Petitioners but caused Petitioners arrest "under the pretense the money [Petitioners' lawful winnings] is surrendered to the [state] agency so it may be returned to [the casino]." Pet. App. 36-40 at 40. The Nevada Supreme Court would have been forced to find that because of the fabricated evidence, Respondents were not entitled to qualified immunity as a matter of law. *McSherry v. City of Long Beach*,

423 F.3d 1015, 1021-1022 (9th Cir. 2005); *Kingsland v. City of Miami*, 382 F.3d 1220, 1232 (11th Cir. 2004).

In short, the Nevada Supreme Court applied gross procedural machinations to avoid having to hear the merits of this federal issue.

CONCLUSION

The state courts of Nevada erroneously applied state discretionary function immunity to Petitioners' proposed federal claim under 42 U.S.C. § 1983 instead of federal qualified immunity. The Nevada Supreme Court avoided the claim in an interim appeal stating the issue could only be raised in a final appeal. Then, when faced with a final appeal, held that the issue could only be addressed in the interim appeal. Aside from the innate unfairness in this decision, the Nevada Supreme Court reached this conclusion by misapplying purported state procedural law. The Nevada Supreme Court did not have a valid excuse supported by state law to not enforce Petitioners' federal rights.

As such, Petitioners, Michael Russo and James Grosjean, request that this Honorable Court grant writ of certiorari and reverse the Nevada Supreme

Court's decision foreclosing Petitioners' claim under 42 U.S.C. § 1983.

Respectfully submitted,

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IN THE SUPREME COURT
OF THE STATE OF NEVADA

MICHAEL RUSSO AND JAMES GROSJEAN,

Appellants,

vs.

THE STATE OF NEVADA/ NEVADA GAMING CONTROL BOARD; RODERICK O'NEAL; AND CHARLES POINTON,

Respondents.

No. 46019

ORDER REINSTATING BRIEFING

(Filed Mar. 30, 2006)

This is an appeal from a district court judgment and an order denying respondent Griffin Investigations' new trial motion.

In this case, appellants filed a tort action naming the respondents listed in the caption of this order, as well as Imperial Palace, Inc., and Donnie Espensen. Respondents State of Nevada Gaming Control Board, and the two named gaming agents, Roderick O'Neal and Charles Pointon, filed a motion to dismiss based on NRS 41.032 immunity. The district court granted the motion and dismissed the action as to those respondents. Appellants filed a motion for reconsideration and also requested leave to amend their complaint to add two additional gaming agents, to

clarify their bad faith argument, and to add a 42 U.S.C. § 1983 claim. The district court denied the reconsideration motion and the request for leave to amend, finding that it would be "futile" and, on appellants' request, certified the judgment as final under NRCP 54(b).

Appellants appealed from the dismissal and also sought to appeal from the denial of their motion for leave to amend their complaint. We affirmed the dismissal order, but concluded that we lacked jurisdiction to consider the order denying appellants' motion for leave to amend on the basis that the order was not susceptible to NRCP 54(b) certification, given that it did not resolve any claim for relief or remove any party from the action.

In the meantime, upon Imperial Palace's motion for severance, the district court bifurcated the claims against Imperial Palace and Donnie Espensen from the claims against Caesars Palace and Griffin Investigations. The portion of the case involving Imperial Palace and Donnie Espensen went to trial and, on January 5, 2005, the district court entered judgment on the jury's verdict, certifying the judgment as final under NRCP 54(b). An appeal and cross-appeal has been taken from that judgment and remains pending in this court.[1]

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[1] *See* Docket No. 44542.

Subsequently, on the claims that remained pending in the district court against respondents Caesars Palace and Griffin Investigations, a jury returned a verdict in favor of appellants, and judgment was entered on that verdict. After the district court denied respondent Griffin Investigations' motion to alter or amend the judgment, for remitttur, and/or for a new trial, appellants appealed. This appeal, Docket No. 46019, is the subject of this order.

After reviewing the docketing statement and supporting documents, we directed appellants to demonstrate that they were aggrieved parties with standing to appeal. Appellants have responded, conceding that they were not aggrieved by the final judgment. Instead, they assert that they seek to challenge the interlocutory order denying their motion for leave to amend their complaint.

Although NRAP 3A(b) does not provide for an independent appeal from an interlocutory order denying a motion for leave to amend a complaint, when an appeal is taken from a final judgment, an interlocutory order may then be challenged on appeal.[2] Although appellants are not technically aggrieved by the final judgment, they are aggrieved by the interlocutory order denying their motion to amend, which can only be challenged in the context of an appeal from the final judgment. Consequently, we

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[2] *Consolidated Generator v. Cummins Engine*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998).

conclude that appellants are aggrieved parties with standing to appeal. Accordingly, the briefing schedule is hereby reinstated. Appellants shall have seventy days from the date of this order within which to file and serve the opening brief and appendix. Thereafter, briefing shall proceed in accordance with NRAP 31(a)(1).

It is so ORDERED.

/s/ Becker, J.
Becker

/s/ Gibbons, J.
Gibbons

/s/ Hardesty, J.
Hardesty

cc: Hon. Lee A. Gates, District Judge
Nersesian & Sankiewicz
Attorney General George Chanos/Gaming Division/Las Vegas
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EIGHTH JUDICIAL DISTRICT COURT

CLARK COUNTY NEVADA

* * *

MICHAEL RUSSO and JAMES GROSJEAN, Plaintiff,	)	
v.	)	
GRIFFIN INVESTIGATIONS, INC., a Nevada Corporation; IMPERIAL PALACE, INC., a Nevada Corporation; PARK PLACE ENTERTAINMENT CORPORATION, a Delaware Corporation dba Caesars Palace; RODERICK O'NEAL; STATE OF NEVADA/NEVADA GAMING CONTROL BOARD; CHARLES POINTON; and	)	Case No. A442687 Dept No. VIII

DOES I-CC, ROES I through XXX, jointly and severally,

Defendants

JUDGMENT IN FAVOR OF STATE GAMING CONTROL BOARD, CHARLES POINTON AND RODERICK O'NEAL

(Filed Aug. 23, 2002)

Since the Plaintiffs' complaint fails to state a claim upon which relief can be granted against Defendants State Gaming Control Board, Roderick O'Neal and Charles Pointon, Plaintiffs' claims against these Defendants are dismissed with prejudice.

IT IS HEREBY ORDERED that since there is no just reason for delay, judgment is entered in favor of Defendants State Gaming Control Board, Roderick O'Neal and Charles Pointon and against Plaintiffs, and Defendants State Gaming Control Board, Roderick O'Neal and Charles Pointon shall recover their costs from Plaintiffs.

DATED: August 22, 2002

/s/ **LEE A. GATES**
LEE A. GATES
DISTRICT COURT JUDGE